



**U.S. ENVIRONMENTAL PROTECTION AGENCY**  
Washington, DC 20460

**Preadward Compliance Review Report for  
All Applicants and Recipients Requesting EPA Financial Assistance**

**Note: Read instructions on other side before completing form.**

I.	Applicant/Recipient (Name, Address, State, Zip Code). Alabama Department of Environmental Management, PO Box 301463, Montgomery, AL 36130	DUNS No. 958550576
II.	Is the applicant currently receiving EPA assistance? Yes	
III.	List all civil rights lawsuits and administrative complaints pending against the applicant/recipient that allege discrimination based on race, color, national origin, sex, age, or disability. (Do not include employment complaints not covered by 40 C.F.R. Parts 5 and 7. See instructions on reverse side.) 1) Title VI Civil Rights Complaint - EPA File No. 16R-17-R4 2) Title VI Civil Rights Complaint - EPA File No. 01R-18-R4	
IV.	List all civil rights lawsuits and administrative complaints decided against the applicant/recipient within the last year that allege discrimination based on race, color, national origin, sex, age, or disability and enclose a copy of all decisions. Please describe all corrective action taken. (Do not include employment complaints not covered by 40 C.F.R. Parts 5 and 7. See instructions on reverse side.) None	
V.	List all civil rights compliance reviews of the applicant/recipient conducted by any agency within the last two years and enclose a copy of the review and any decisions, orders, or agreements based on the review. Please describe any corrective action taken. (40 C.F.R. § 7.80(c)(3)) Please see attached for detail of review and corrective action taken.	
VI.	Is the applicant requesting EPA assistance for new construction? If no, proceed to VII; if yes, answer (a) and/or (b) below. Yes No X a. If the grant is for new construction, will all new facilities or alterations to existing facilities be designed and constructed to be readily accessible to and usable by persons with disabilities? If yes, proceed to VII; if no, proceed to VI(b). Yes No b. If the grant is for new construction and the new facilities or alterations to existing facilities will not be readily accessible to and usable by persons with disabilities, explain how a regulatory exception (40 C.F.R. § 7.70) applies. Yes No	
VII.	Does the applicant/recipient provide initial and continuing notice that it does not discriminate on the basis of race, color, national origin, sex, age, or disability in its programs or activities? (40 C.F.R. § 5.140 and § 7.95) Yes X No a. Do the methods of notice accommodate those with impaired vision or hearing? Yes X No b. Is the notice posted in a prominent place in the applicant's offices or facilities or, for education programs and activities, in appropriate periodicals and other written communications? Yes X No c. Does the notice identify a designated civil rights coordinator? Yes X No	
VIII.	Does the applicant/recipient maintain demographic data on the race, color, national origin, sex, age, or handicap of the population it serves? (40 C.F.R. § 7.85(a)) Yes	
IX.	Does the applicant/recipient have a policy/procedure for providing access to services for persons with limited English proficiency? (40 C.F.R. Part 7, E.O. 13166) Yes	
X.	If the applicant/recipient is an education program or activity, or has 15 or more employees, has it designated an employee to coordinate its compliance with 40 C.F.R. Parts 5 and 7? Provide the name, title, position, mailing address, e-mail address, fax number, and telephone number of the designated coordinator. Marilyn Elliott, Deputy Director, Mailing address (See # 1 above) mge@adem.alabama.gov Phone: 334-271-7710 Fax: 334-271-7950	
XI.	If the applicant/recipient is an education program or activity, or has 15 or more employees, has it adopted grievance procedures that assure the prompt and fair resolution of complaints that allege a violation of 40 C.F.R. Parts 5 and 7? Provide a legal citation or Internet address for, or a copy of, the procedures. <a href="http://adem.alabama.gov">http://adem.alabama.gov</a>	

**For the Applicant/Recipient**

I certify that the statements I have made on this form and all attachments thereto are true, accurate and complete. I acknowledge that any knowingly false or misleading statement may be punishable by fine or imprisonment or both under applicable law. I assure that I will fully comply with all applicable civil rights statutes and EPA regulations.

A. Signature of Authorized Official Completed by Grants.com upon submission.	B. Title of Authorized Official Chief Fiscal Officer	C. Date Completed by Grants.com upon sub.
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**For the U.S. Environmental Protection Agency**

I have reviewed the information provided by the applicant/recipient and hereby certify that the applicant/recipient has submitted all preaward compliance information required by 40 C.F.R. Parts 5 and 7; that based on the information submitted, this application satisfies the preaward provisions of 40 C.F.R. Parts 5 and 7; and that the applicant has given assurance that it will fully comply with all applicable civil rights statutes and EPA regulations.

A. Signature of Authorized EPA Official See * note on reverse side	B. Title of Authorized EPA Official	C. Date
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**Instructions for EPA FORM 4700-4 (Rev. 06/2014)****General**

Recipients of Federal financial assistance from the U.S. Environmental Protection Agency must comply with the following statutes and regulations.

Title VI of the Civil Rights Acts of 1964 provides that no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. The Act goes on to explain that the statute shall not be construed to authorize action with respect to any employment practice of any employer, employment agency, or labor organization (except where the primary objective of the Federal financial assistance is to provide employment).

Section 13 of the 1972 Amendments to the Federal Water Pollution Control Act provides that no person in the United States shall on the ground of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under the Federal Water Pollution Control Act, as amended. Employment discrimination on the basis of sex is prohibited in all such programs or activities.

Section 504 of the Rehabilitation Act of 1973 provides that no otherwise qualified individual with a disability in the United States shall solely by reason of disability be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. Employment discrimination on the basis of disability is prohibited in all such programs or activities.

The Age Discrimination Act of 1975 provides that no person on the basis of age shall be excluded from participation under any program or activity receiving Federal financial assistance. Employment discrimination is not covered. Age discrimination in employment is prohibited by the Age Discrimination in Employment Act administered by the Equal Employment Opportunity Commission.

Title IX of the Education Amendments of 1972 provides that no person in the United States on the basis of sex shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. Employment discrimination on the basis of sex is prohibited in all such education programs or activities. Note: an education program or activity is not limited to only those conducted by a formal institution.

40 C.F.R. Part 5 implements Title IX of the Education Amendments of 1972.

40 C.F.R. Part 7 implements Title VI of the Civil Rights Act of 1964, Section 13 of the 1972 Amendments to the Federal Water Pollution Control Act, and Section 504 of The Rehabilitation Act of 1973.

The Executive Order 13166 (E.O. 13166) entitled; "Improving Access to Services for Persons with Limited English Proficiency" requires Federal agencies work to ensure that recipients of Federal financial assistance provide meaningful access to their LEP applicants and beneficiaries.

**Items**

"Applicant" means any entity that files an application or unsolicited proposal or otherwise requests EPA assistance. 40 C.F.R. §§ 5.105, 7.25.

"Recipient" means any entity, other than applicant, which will actually receive EPA assistance. 40 C.F.R. §§ 5.105, 7.25.

"Civil rights lawsuits and administrative complaints" means any lawsuit or administrative complaint alleging discrimination on the basis of race, color, national origin, sex, age, or disability pending or decided against the applicant and/or entity which actually benefits from the grant, but excluding employment complaints not covered by 40 C.F.R. Parts 5 and 7. For example, if a city is the named applicant but the grant will actually benefit the Department of Sewage, civil rights lawsuits involving both the city and the Department of Sewage should be listed.

"Civil rights compliance review" means any review assessing the applicant's and/or recipient's compliance with laws prohibiting discrimination on the basis of race, color, national origin, sex, age, or disability.

Submit this form with the original and required copies of applications, requests for extensions, requests for increase of funds, etc. Updates of information are all that are required after the initial application submission.

If any item is not relevant to the project for which assistance is requested, write "NA" for "Not Applicable."

In the event applicant is uncertain about how to answer any questions, EPA program officials should be contacted for clarification.

\* Note: Signature appears in the Approval Section of the EPA Comprehensive Administrative Review For Grants/Cooperative Agreements & Continuation/Supplemental Awards form.

**"Burden Disclosure Statement"**

EPA estimates public reporting burden for the preparation of this form to average 30 minutes per response. This estimate includes the time for reviewing instructions, gathering and maintaining the data needed and completing and reviewing the form. Send comments regarding the burden estimate, including suggestions for reducing this burden, to U.S. EPA, Attn: Collection Strategies Division (MC 2822T), Office of Information Collection, 1200 Pennsylvania Ave., NW, Washington, D.C. 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503.

The information on this form is required to enable the U.S. Environmental Protection Agency to determine whether applicants and prospective recipients are developing projects, programs and activities on a nondiscriminatory basis as required by the above statutes and regulations.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460



EXTERNAL CIVIL RIGHT COMPLIANCE OFFICE  
OFFICE OF GENERAL COUNSEL

April 28, 2017

**Return Receipt Requested**

Certified Mail #: 7015 3010 0001 1267 5874  
Lance LeFleur, Director  
Alabama Department of Environmental Management  
P.O. Box 301463  
Montgomery, Alabama 36130-1463

**In Reply Refer to:**

EPA File No. 06R-03-R4

**Re: Closure of Administrative Complaint, EPA File No. 06R-03-R4**

Dear Director LeFleur:

This letter is to notify you that the U.S. Environmental Protection Agency's (EPA) External Civil Rights Compliance Office (ECRCO) is resolving and closing, as of the date of this letter, the administrative complaint filed with EPA on December 8, 2003, against the Alabama Department of Environmental Management (ADEM). The complaint generally alleged that ADEM violated Title VI of the Civil Rights Act of 1964, as amended, 42 United States Code 2000d et seq. (Title VI) and the EPA's nondiscrimination regulation found at 40 Code of Federal Regulations (C.F.R.) Part 7. With respect to the specific issues addressed in this case, EPA ECRCO finds insufficient evidence to conclude that ADEM violated Title VI and EPA's nondiscrimination regulation.

EPA ECRCO is responsible for enforcing several federal civil rights laws that prohibit discrimination on the bases of race, color, national origin (including limited-English proficiency), disability, sex, and age in programs or activities that receive federal financial assistance from the EPA. On September 7, 2005, EPA accepted for investigation two allegations raised in the December 2003 complaint.<sup>1</sup> On January 25, 2013, EPA issued a letter dismissing one of those allegations.<sup>2</sup> EPA's 2013 letter concluded that, with respect to the allegation that ADEM intentionally discriminated against the African American residents of the Ashurst Bar/Smith community during the public involvement process for the permitting of a modification to the Tallassee Waste Disposal Center, Inc. in 2003, there was insufficient evidence of non-compliance.

<sup>1</sup> Letter from Karen D. Higginbotham, Director, OCR to Phyllis Gosa, Complainant, Acceptance of Administrative Complaint (September 7, 2005).

<sup>2</sup> Letter from Rafael DeLeon, Director, OCR to Lance LeFleur, Director, ADEM (January 25, 2013); Partial Dismissal of Title VI Administrative Complaint.

The remaining allegation (as originally accepted for investigation) was:

Whether ADEM's failure to require the Tallapoosa County Commission to properly use the siting factors listed in the EPA June 2003 Title VI Investigative Report (EPA File No. 28R-99-R4)<sup>3</sup> in considering for approval the 2003 application to modify Permit #62-11 for the Tallassee Waste Disposal Center, Inc.,<sup>4</sup> located in Tallassee, Tallapoosa County, Alabama, had a discriminatory effect on the predominantly African-American residents of the Ashurst Bar/Smith community on the basis of race.

With respect to this issue, as investigated, ECRCO finds that the record does not establish a prima facie case of discrimination based on disparate impact with respect to allegations set forth in this complaint regarding the 2003 permit modification. Accordingly, ECRCO finds insufficient evidence to conclude that ADEM violated Title VI and EPA's nondiscrimination regulation in regard to the 2003 permit modification at issue in this case and EPA File No. 06R-03-R4 is closed as of the date of this letter. As explained later in this letter, information gathered during the course of this investigation and additional pending investigations involving ADEM have raised issues not addressed by this letter. ECRCO will be contacting ADEM to discuss these issues and possible options for addressing them.

#### *Clarification of Issue Investigated in This Case*

EPA originally accepted for investigation the allegation that ADEM's failure to require the Tallapoosa County Commission to properly use the siting factors listed in the EPA June 2003 Title VI Investigative Report (EPA File No. 28R-99-R4)<sup>5</sup> in the 2003 permit modification process for the Tallassee Waste Disposal Center, Inc., had a discriminatory effect on the predominantly African-American residents of the Ashurst Bar/Smith community. However, during the course of the investigation, ECRCO determined that whether ADEM properly considered the siting factors in its decision to approve the 2003 permit modifications is not germane to ECRCO's determination of whether there was an adverse disparate impact that resulted from ADEM's approval of the 2003 permit modification. Specifically, as discussed more fully below, there is insufficient evidence that the 2003 permit modifications themselves – whether or not they were considered in light of the six solid waste management planning criteria (i.e. the six "siting factors") – were sufficiently causally connected to the disparate adverse harms alleged by Complainants.<sup>6</sup>

<sup>3</sup> Letter from Karen D. Higginbotham, Director, OCR to Luke Cole, Director, Center for Race Poverty and the Environment (CRPE) and James W. Warr, Director, ADEM; Re: EPA File No. 28R-99-R4 (July 1, 2003).

<sup>4</sup> Tallassee Waste Disposal Center, Inc. is now known as Stone's Throw Landfill.

<sup>5</sup> Letter from Karen D. Higginbotham, Director, OCR to Luke Cole, Director, Center for Race Poverty and the Environment (CRPE) and James W. Warr, Director, ADEM; Re: EPA File No. 28R-99-R4 (July 1, 2003).

<sup>6</sup> Ultimately, Complainants' allegations of harm appear to be related to the initial permitting and siting of the Tallassee Waste Disposal Center, Inc. ADEM's decision to permit the Tallassee Waste Disposal Center, Inc. occurred in 2001, several years prior to the filing of this complaint.

The following provides additional context and background regarding the six “siting factors”<sup>7</sup> listed in the EPA June 2003 Title VI Investigative Report. In response to a 1999 Title VI complaint alleging adverse and disparate impact violations by ADEM in connection with the issuance and modification of permits at four specific municipal solid waste landfills in Alabama (not including the Tallassee Waste Disposal Center, Inc.), EPA issued its legal and factual findings in a decision letter dated July 1, 2003, and accompanying June 2003 Investigative Report. EPA found no violation of Title VI with respect to disparate impact claims for each of the four landfills, as well as an intentional discrimination claim asserted with regard to the permitting of all municipal solid waste landfills in Alabama.

At the time of EPA’s 2003 investigation of EPA File No. 28R-99-R4, it was ADEM’s position that the “siting factor” assessments were the responsibility of local governments and that it could only deny a permit if the site was environmentally unsuitable from a technical perspective (and not for siting factor reasons). The 2003 Investigative Report and Decision Letter stated: “... EPA notes that the administration of ADEM’s Solid Waste Program may nevertheless lead to violations of EPA’s Title VI regulations in the future because the potential failure to consider safety or socio-economic impacts could lead to ADEM-permitted landfills that have an adverse disparate impact on a population protection by EPA’s Part 7 regulations.”<sup>8</sup> EPA did not, however, determine that failure to ensure that such criteria were considered by ADEM or local governments was in and of itself a Title VI violation. Ultimately, a Title VI violation would arise if an ADEM-approved permit actually caused adverse and disproportionate impacts.

Consequently, our investigation of the allegations arising in this complaint focused on whether or not ADEM’s 2003 permit modification decision for the Tallassee Waste Disposal Center, Inc. resulted in an adverse and disparate impact to the predominantly African-American residents of the Ashurst Bar/Smith community.

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<sup>7</sup> Under the Alabama Code at § 22-27-47 and § 22-27-48, the state legislature specifically directs the requirements outlined relating to permit applications at the local host jurisdiction. ADEM has consistently taken a position that such responsibilities are outside their purview. Under ADEM Admin. Code r. §335-13-9-.06, local authorities must develop Solid Waste Management Plans that are consistent with the various outlined procedures, which are inclusive of the six criteria outlined under Alabama Code § 22-27-47(b)(11) and submit them to ADEM. The six criteria are as follows:

- a. The jurisdiction’s solid waste management needs as identified in its plan;
- b. The relationship of the proposed location or locations to planned or existing development, to major transportation arteries and to existing state primary and secondary roads;
- c. The relationship of the proposed location or locations to existing industries in the jurisdiction or state that generate large volumes of solid waste and to the areas projected by the state or local regional planning and development commission for development of industries that will generate solid waste;
- d. The costs and availability of public services, facilities and improvements which would be required to support a facility in this location and protect public health, safety and the environment;
- e. The potential impact a facility in the proposed location or locations would have on public health and safety, and the potential that such locations can be utilized in a manner so as to minimize the impact on public health and safety; and
- f. The social and economic impacts that a facility at the proposed location would have on the affected community, including changes in property values, community perception and other costs.

<sup>8</sup> EPA June 2003 Title VI Investigative Report (EPA File No. 28R-99-R4, Yerkwood, 95-96, June 2003.)

In conducting the investigation, ECRCO gathered and reviewed all of the information relevant to the complaint. This information included the complaint submitted to ECRCO, ADEM's responses to ECRCO's acceptance of the complaint, and all other letters and emails ECRCO received from the complainant and recipient pertaining to the 2003 permit modification for the Tallassee Waste Disposal Center, Inc. ECRCO also considered information gathered through various emails from, and telephone interviews with, the Complainants and community members in 2016 and 2017.

### Legal Standard

EPA's investigation was conducted under the authority of Title VI of the Civil Rights Act of 1964, and EPA's nondiscrimination regulation (40 C.F.R. Part 7) and consistent with EPA's Case Resolution Manual. EPA's regulation at 40 C.F.R. §7.35(b) states, in part, that "A recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, or national origin."

The issue of whether ADEM's approval of the 2003 application to modify Permit #62-11 for the Tallassee Waste Disposal Center, Inc. had a discriminatory effect on the predominantly African-American residents of the Ashurst Bar/Smith community on the basis of race, was analyzed under a *disparate impact* or *discriminatory effects* standard.<sup>9</sup>

In a disparate impact case, EPA must determine whether the recipient used a facially neutral policy or practice that had a sufficiently adverse (harmful) and disproportionate effect based on race, color, or national origin. This is referred to as the *prima facie* case. To establish an adverse disparate impact, EPA must:

- (1) identify the specific policy or practice at issue;
- (2) establish adversity/harm;<sup>10</sup>
- (3) establish disparity;<sup>11</sup> and

<sup>9</sup> *Guardians Ass'n. v. Civil Serv. Comm'n*, 463 U.S. 582, 593 (1983); *Alexander v. Choate*, 469 U.S. 287, 293 (1985). Many subsequent cases have also recognized the validity of Title VI disparate impact claims. *See, e.g.* *Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996); *New York Urban League v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *Chicago v. Lindley*, 66 F.3d 819 (7th Cir. 1995); *David K. v. Lane*, 839 F.2d 1265 (7th Cir. 1988); *Gomez v. Illinois State Bd. Of Educ.*, 811 F.2d 1030 (7th Cir. 1987); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403 (11th Cir. 1985); *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984). In addition, by memorandum dated July 14, 1994, the Attorney General directed the Heads of Departments and Agencies to "ensure that the disparate impact provisions in your regulations are fully utilized so that all persons may enjoy equally the benefits of [f]ederally financed programs." Attorney General Memorandum on the use of the Disparate Impact Standard in Administrative Regulations under Title VI of the Civil Rights Act of 1964 (July 14, 1994) (<http://www.justice.gov/ag/attorney-general-july-14-1994-memorandum-use-disparate-impact-standard-administrative-regulations>).

<sup>10</sup> Adversity exists if a fact specific inquiry determines that the nature, size, or likelihood of the impact is sufficient to make it an actionable harm.

<sup>11</sup> In analyzing disparity, EPA analyzes whether a disproportionate share of the adversity/harm is borne by individuals based on their race, color, national origin, age, disability or sex. A general measure of disparity compares the proportion of persons in the protected class who are adversely affected by the challenged policy or decision and the proportion of persons not in the protected class who are adversely affected. *See Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 576-77 (2d Cir. 2003).

(4) establish causation.<sup>12</sup>

The focus here is on the consequences of the recipient's policies or decisions, rather than the recipient's intent.<sup>13</sup> The neutral policy or decision at issue need not be limited to one that a recipient formalizes in writing, but also could be one that is understood as "standard operating procedure" by recipient's employees.<sup>14</sup> Similarly, the neutral practice need not be affirmatively undertaken, but in some instances could be the failure to take action, or to adopt an important policy.<sup>15</sup>

If the evidence establishes a prima facie case of adverse disparate impact, as discussed above, EPA must then determine whether the recipient has articulated a "substantial legitimate justification" for the challenged policy or practice.<sup>16</sup> "Substantial legitimate justification" in a disparate impact case is similar to the Title VII employment concept of "business necessity," which in that context requires a showing that the policy or practice in question is demonstrably related to a significant, legitimate employment goal.<sup>17</sup> The analysis requires balancing recipients' interests in implementing their policies with the substantial public interest in preventing discrimination.

If a recipient shows a "substantial legitimate justification" for its policy or decision, EPA must also determine whether there are any comparably effective alternative practices that would result in less adverse impact. In other words, are there "less discriminatory alternatives?"<sup>18</sup> Thus, even if a recipient demonstrates a "substantial legitimate justification," the challenged policy or decision will nevertheless violate federal civil rights laws if the evidence shows that "less discriminatory alternatives" exist.

## Analysis

<sup>12</sup> See *N.Y.C. Envtl. Justice All. v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000) (plaintiffs must "allege a causal connection between a facially neutral policy and a disproportionate and adverse impact on minorities").

<sup>13</sup> *Lau v. Nichols*, 414 U.S. 563, at 568 (1974).

<sup>14</sup> If as part of a recipient's permitting of a facility, a recipient makes a decision with respect to the siting of a facility, such decision may not intentionally discriminate or have a discriminatory effect on a protected population. EPA's regulation states, "A recipient shall not choose a site or location of a facility that has the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program or activity to which this part applies on the grounds of race, color, or national origin or sex; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of this subpart." 40 C.F.R. § 7.35(c).

<sup>15</sup> See, e.g., *Maricopa Cty.*, 915 F. Supp. 2d 1073, 1079 (D. Ariz. 2012) (disparate impact violation based on national origin properly alleged where recipient "failed to develop and implement policies and practices to ensure [limited English proficient] Latino inmates have equal access to jail services" and discriminatory conduct of detention officers was facilitated by "broad, unfettered discretion and lack of training and oversight" resulting in denial of access to important services).

<sup>16</sup> *Georgia State Conf.*, 775 F.2d at 1417.

<sup>17</sup> *Wards Cove Packing Inc. v. Antonio*, 490 U.S. 642, 659 (1989); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-36 (1971). The concept of "business necessity" does not transfer exactly to the Title VI context because "business necessity" does not cover the full scope of recipient practices that Title VI covers, which applies far more broadly to many types of public and non-profit entities. See *Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507, 2522-24 (2015) (recognizing the limitations on extension of the business necessity concept to Fair Housing Act complaints).

<sup>18</sup> *Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993).

The issue being investigated in the instant complaint is whether ADEM's approval of the 2003 modification to Permit #62-11 for the Tallassee Waste Disposal Center, Inc. had a discriminatory effect on the predominantly African-American residents of the Ashurst Bar/Smith community on the basis of race.

Consistent with the legal standard outlined above for determining whether a prima facie case is established, EPA looks to determine whether a causal connection exists between a recipient's facially neutral policy or practice and an adverse disparate impact.<sup>19</sup> Specifically, in a case such as this one where the policy or practice relates to a permit modification, EPA generally looks at the modification at issue and the modification's effects. While permit modifications can trigger Title VI violations, there must be some causal connection between the permit modification actions that appear to be facially neutral and the alleged adverse (harmful) and disparate effects.<sup>20</sup> If EPA cannot establish that each of the prima facie elements has been met, then EPA does not have sufficient evidence to establish a prima facie case of adverse disparate impact and cannot determine that the recipient has engaged in discrimination.

To determine whether a disparate impact occurred as a result of ADEM's issuance of the 2003 permit modification, with or without consideration of the siting factors, ECRCO examined the proposed permit modification actions and whether they could have caused the alleged disproportionate harms. As discussed more specifically below, as to each of the alleged harms relating to the 2003 permit modifications, ECRCO finds insufficient evidence to establish a prima facie case of disparate impact discrimination.

#### *October 2001 Permit (Permit #62-11)*

In October 2001, ADEM granted Permit #62-11, for a Resource Conservation and Recovery Act (RCRA) Subtitle D<sup>21</sup> municipal solid waste permit for the Tallassee Waste Disposal Center, Inc., an approximately 123.47-acre disposal area.<sup>22</sup> Within the boundaries of the Tallassee Waste Disposal Center, Inc. there was a formerly operated, but closed sanitary landfill.

#### *The 2003 Permit Modification*

The permit modification considered and approved the following:<sup>23</sup>

- Design and construction of cells 2A and 2B, an approximately 5.11-acre municipal solid waste (MSW) disposal area;

<sup>19</sup> See *New York City Envtl. Justice Alliance v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000) (citing *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 712 (2d Cir. 1998); *New York Urban League, Inc. v. New York*, 71 F.3d at 1036).

<sup>20</sup> See *New York City Envtl. Justice Alliance v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000) (plaintiffs must "allege a causal connection between a facially neutral policy and a disproportionate and adverse impact on minorities").

<sup>21</sup> 40 C.F.R. Part 258 (RCRA Subtitle D regulation for municipal solid waste landfill.)

<sup>22</sup> ADEM, Public Hearing Transcript, August 26, 2003, at 11.

<sup>23</sup> ECE Letter to ADEM, Request for Major Modification, April 30, 2003. In the original ECE Letter to ADEM, Request for Major Modification, April 30, 2003, there had been a request to add an 80-acre parcel to the permitted area. This request was withdrawn by ECE in a Letter to ADEM, Revision to Major Modification Request, May 30, 2003, and therefore, the addition of the 80-acre parcel was not ultimately considered for approval by ADEM.



- Design and construction of an approximately 6.56-acre construction and demolition (C/D) materials landfill;
- Relocation of the facility's sedimentation pond; and
- Operational changes.<sup>24</sup>

The types of waste accepted, service area, and daily accepted waste volumes and the landfill boundaries that were permitted in 2001, remained unchanged in the proposed and approved 2003 permit modification.<sup>25</sup>

### *The Alleged Harms*

The alleged harms that relate to the 2003 permit modification were as follows:<sup>26</sup>

- **Environmental and Community Health Concerns**
  - Impact from methane exceedances for the entire first year after reopening and lack of notification;
  - Impact from proximity to natural gas line;
  - Impact to wetlands, natural springs, environmental balance in region;
  - Air pollution from landfill emissions into populated areas due to wind patterns;
  - Impact to hunting and wildlife from surface water contamination and impacts to foliage;
  - Increase in disease vectors;
  - Drinking water well contamination concerns;
  - Impact on the Tuscaloosa Aquifer;
  - Impact of sedimentation pond relocation and storm water runoff;
  - Impact on the Gleeden Branch and other streams that leave the area and eventually contribute to water sources of downstream municipalities
  - Impact of landfill on farmers' animals and food gardens;
- **Transportation and Safety Concerns**
  - Lack of an evacuation and decontamination plan;

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<sup>24</sup> On June 4, 2003, ECE submitted a request to ADEM for operational changes as follows: 1) for an alternative design for the drainage layer that continued to meet the permeability standard and an equivalent hydraulic flow rate; 2) for leachate recirculation; and 3) for implementation for the use of alternative daily covers. ECE Letter to ADEM, Re: Comments on Draft Permit, June 4, 2003.

<sup>25</sup> ADEM, Public Hearing Transcript, August 26, 2003, at 11; ADEM, Public Hearing Notice, July 17, 2003.

<sup>26</sup> Letter from Phyllis D. Gosa, to Karen D. Higginbotham, Director, OCR (September 3, 2003), includes letter from Phyllis Gosa to James W. Warr, Director, ADEM (August 29, 2003) as attachment; Letter from Phyllis D. Gosa, to Karen D. Higginbotham, Director, OCR (December 15, 2003), at 3. Many of the issues raised in the complaint were phrased in the form of questions to ADEM. ECRCO has grouped and listed these items as alleged harms relating to the issues investigated. Items remaining after the dismissal of allegation 1 and included in list are items 5-29, 33 on pages 1-3, 5 of the letter from Phyllis Gosa to James W. Warr, Director, ADEM, August 29, 2003. In addition, ECRCO considered information gathered through various emails from, and telephone interviews with, the Complainants and community members in 2016 and 2017.

- Lack of emergency response equipment and infrastructure (ambulances, fire trucks, etc.);
  - Impact to church due to proximity of landfill;
  - Impacts resulting from traffic and roadway design;
  - Impacts to homes due to close setbacks of residences to roadway;
  - Impacts from landfill traffic coming from prohibited directions;
  - Large service area; and
  - Issues relating to line of sight, lack of signage, and traffic speed enforcement.
- **Non-Environmental Concerns Raised by Complainants**
    - Diminution of property value;
    - Displacement of landowners; and
    - Stigma of living near a landfill.

For purposes of analyzing whether there is a prima facie case of discrimination based on disparate impacts, ECRCO has grouped the alleged harms into the same topical categories utilized above.

# **1. Environmental and Community Health Concerns**

- Methane Gas Exceedances and Lack of Notification:

Complainants raised concerns regarding “numerous non-compliance reports of high methane gas levels” at Tallassee Waste Disposal Center, Inc. since its reopening and the initial placement of waste in 2002 and also raised concern that “the community was not notified and to date there is not in place a mechanism to alert the community of such dangers.”<sup>27</sup> With respect to the concern regarding “notification,” ECRCO has found that current state<sup>28</sup> and federal<sup>29</sup> regulations

<sup>27</sup> Letter from Phyllis D. Gosa, to Karen D. Higginbotham, Director, OCR (September 3, 2003), includes letter from Phyllis Gosa to James W. Warr, Director, ADEM (August 29, 2003) at 3.

<sup>28</sup> Alabama state requirements outlined at ADEM Admin. Code r. §335-13-4-.16(3) are as follows: 3. If explosive gas levels exceeds the limits specified in this Rule, the permittee shall:

(i) Immediately take all necessary steps to ensure protection of human health and property and notify the Department;

(ii) Within 7 days of detection, place in the operating record of the facility the explosive gas levels detected and the immediate steps taken to protect human health and property;

(iii) Within 20 days of detection, submit to the Department for approval a remedial plan for the explosive gas releases. This plan shall describe the nature and extent of the problem and the proposed remedy. The plan shall be implemented upon approval by the Department, but within 60 days of detection. Also within 60 days of detection, a copy of the plan shall be placed in the operating record of the facility and the Department notified that the plan has been implemented.

<sup>29</sup> Under RCRA, the requirements at 40 C.F.R. §258.23(c) are the following: (c) If methane gas levels exceeding the limits specified in paragraph (a) of this section are detected, the owner or operator must:

(1) Immediately take all necessary steps to ensure protection of human health and notify the State Director;

(2) Within seven days of detection, place in the operating record the methane gas levels detected and a description of the steps taken to protect human health; and

do not require public notification when or if a landfill detects an emission exceedance during the course of their quarterly monitoring. The permitted facility is required to notify the state regulatory office within a prescribed time period and take the necessary steps to protect human health and the environment.

With respect to the concern raised in the complaint regrading “reports of high methane gas levels,” ECRCO examined whether the high methane gas levels detected in 2002 were causally related to the 2003 permit modification actions. ECRCO confirmed that the landfill engineers reported that there was an increased production of methane gas due to a portion of the Tallassee Waste Disposal Center, Inc. having a tendency to hold water and maintain moisture.<sup>30</sup> This portion of the landfill had soils introduced to modify the side slopes and improve positive drainage resulting in both less saturated soils and methane gas generation. This portion of the landfill was closed prior to the 2003 permit modification.<sup>31</sup> ECRCO determined that, although located within the property boundaries of the Tallassee Waste Disposal Center, Inc., this closed sanitary landfill was a separate and completely independent disposal unit. The Subtitle D municipal solid waste landfill related to the 2003 permit modification was just being designed for construction in 2003 and, at that time, would not have contributed to any increase in methane gas levels since waste disposal activities and methane gas generation had not begun. As such, there is insufficient evidence in the record to show a causal link between the 2003 permit modification and the alleged harm of increased methane gas levels – exceedances as articulated in the complaint.

- Natural Gas Line:

Complainants raised concerns about the landfill’s overall proximity to a natural gas line. ECRCO confirmed that, based on the landfill’s engineering drawings, a 100-foot “power easement” bisects the landfill’s property.<sup>32</sup> The actual existence of a natural gas line within the 100-foot easement was not confirmed by ECRCO’s investigation as the survey does not depict the description of the type of utility or the easement owner(s). Any gas line, as well as the land on which the gas line would be found, are within the control and purview of the appropriate utility company. The 100-foot easement existed before the 2003 permit modification; and, the modification did not impact the easement.<sup>33</sup> Accordingly, there is insufficient evidence in the record to show a causal link between the 2003 permit modification and the alleged harm related to a natural gas line or the easement for that line.

- Wetlands:

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(3) Within 60 days of detection, implement a remediation plan for the methane gas releases, place a copy of the plan in the operating record, and notify the State Director that the plan has been implemented. The plan shall describe the nature and extent of the problem and the proposed remedy.

<sup>30</sup> ECE, Tallassee Waste Disposal Center, Inc. Explosive Gas Report Summary, Permit No. 62-11 Response Letter (October 15, 2002).

<sup>31</sup> ECE, Tallassee Waste Disposal Center, Inc. Explosive Gas Report Summary, Permit No. 62-11 Response Letter (October 15, 2002).

<sup>32</sup> ECE Permit Drawings for Modification of Sunflower Landfill Inc. Cell 2A. Cell 2B, C&D Cell (March 2003).

<sup>33</sup> ECE Permit Drawings for Modification of Sunflower Landfill Inc. Cell 2A. Cell 2B, C&D Cell (March 2003).

The complaint raised a concern about the alleged environmental harm to wetlands resulting from the relocation of the sedimentation pond under the 2003 permit modification. Under the 2003 permit modification, although wetlands were impacted, the facility proposed and the Department of the Army, Mobile District, Corps of Engineers (COE) approved, payment into a mitigation bank to develop relocated wetlands within the same watershed in order to address any impact on water quality that would result from the permitted construction activities.<sup>34</sup> Once the mitigation was approved, the COE issued a permit to the landfill to fill in the wetlands located within the permitted area.<sup>35</sup> In light of the approved wetlands mitigation and relocation, there is insufficient evidence in the record to conclude that there was adverse harm with respect to the wetlands<sup>36</sup>

- Wind Blown Pollution:

Complainants assert harm due to wind patterns carrying pollution and landfill emissions into populated areas. While operation of the 2003 expansion area could potentially increase the landfill's overall emissions, ECRCO found that the facility has taken measures to monitor and address emissions. ECRCO found that the facility implemented quarterly landfill gas monitoring,<sup>37</sup> and installed an emissions control system in the closed sections of the MSW landfill.<sup>38</sup> The facility further extended the control system over time into the former sanitary landfill operation,<sup>39</sup> and into the closed C/D cells, and into portions of the active phase of the landfill. Therefore, there is insufficient evidence in the record to show a causal link between the 2003 permit modification and alleged increased air pollution.

- Hunting:

Complainants alleged harms to the surface water and foliage used by the wildlife and impacts to hunting within the community due to the 2003 permit modification. However, ECRCO could not establish a prima facie case of disparate adverse harm with respect to this allegation. First, ECRCO could not find any information in the record with respect to the condition of the surface water and foliage used by wildlife prior to the 2003 permit modification. As such, ECRCO could not find that the record established a baseline upon which to measure potential impact to surface water and foliage used by wildlife which could have resulted from any of the 2003 permit modification actions. Therefore, ECRCO finds insufficient evidence in the record to

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<sup>34</sup> ADEM Administrative Code Division 13 prohibits the disposal of solid wastes in wetlands. The relocation of wetlands requires approval from the U.S. Department of the Army, Mobile District, Corps of Engineers (COE) and the State of Alabama. 40 C.F.R. §258.12 (Wetlands); ADEM Admin. Code r. §335-13-4-.01(2)(c) Landfill Unit Siting Standards - Landfill units including buffer zones shall not be permissible in wetlands, beaches or dunes.

<sup>35</sup> ADEM Response to Comments, October 20, 2003, at 3.

<sup>36</sup> Section 404 of the Clean Water Act establishes a program to regulate the discharge of fill materials into the waters of the U.S. The program through permitting activities allows for restoration through compensatory mitigation. *See* 40 C.F.R. 230 Subpart J—Compensatory Mitigation for Losses of Aquatic Resources. There are three (3) options for compensatory mitigation to address restoration of the permitted activities. The operator (permittee) proposes which option they would like to employ for such activities. These options include the mitigation bank, fee program to government or non-profit, or the operator (permittee) undertakes the mitigation. Here, the permittee has selected the mitigation bank as their compensatory mitigation option.

<sup>37</sup> *See i.e.*, Environmental Consulting & Engineering, Inc. (ECE), March 24, 2005 Tallassee Waste Disposal Center, Inc. Explosive Gas Report Summary First Quarter 2005, Permit No. 62-11.

<sup>38</sup> ADEM Engineering Analysis, Stone's Throw Landfill LLC, Facility No. 205-0015 (April 13, 2010).

<sup>39</sup> ADEM Engineering Analysis, Stone's Throw Landfill LLC, Facility No. 205-0015 (April 13, 2010).

conclude that there was adverse harm with respect to the surface water and foliage used by wildlife and its impact on hunting.

- Disease Vectors:

Complainants raised a concern that the 2003 modification's approval of a switch from use of daily soil cover to use of an alternative daily cover material would increase exposure to rodents, insects, and other wildlife including wild dogs and the resulting potential for transmission of diseases. During a 2016 interview, Complainants stated that they had observed increases in vultures, wild dogs, deer and crows since the 2003 modification.<sup>40</sup>

ECRCO found that alternative materials may be approved in lieu of daily soil cover if the operator shows that they are protective of human health and the environment<sup>41</sup> and minimize and manage the impact from animals and other disease vectors.<sup>42</sup> ECRCO found that, in this case, ADEM approved use of alternative cover materials on a daily basis, as well as the use of a soil cover at least once per week at the end of the operational work week.<sup>43</sup>

ECRCO confirmed that prior to the 2003 permit modification, previous construction activities conducted within the ~500-acre site removed natural habitats, re-graded the site, and prepared the property for the landfill's development. ECRCO also confirmed that the 2003 permitting actions continued the site development/re-development -- specifically, the development of cells 2a and 2b, the C&D unit, and the associated sediment and erosion control units. ECRCO acknowledges that it is possible that these 2003 permit activities could have impacted animal population numbers, but, there is insufficient evidence in the record for ECRCO to conclude that the 2003 permit modification actions themselves resulted in sufficiently significant harm with regard to increases in the animal population. As such, ECRCO could not establish a causal link between the 2003 permit modification and any changes in animal population numbers.

- Drinking Water Wells:

Concerns were raised about pre-existing safety hazards related to drinking water, such as the presence of toluene, including in well water and naturally occurring springs, and how the continued development of the landfill could contribute to these safety hazards.

ECRCO found that prior to the permitting of the Tallassee Waste Disposal Center, Inc. Subtitle D municipal solid waste landfill in October 2001, a preliminary environmental investigation report and a hydrogeological evaluation were completed.<sup>44</sup> The report documented pre-existing

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<sup>40</sup> February 10, 2016 Interview with Complainants.

<sup>41</sup> 40 C.F.R. §258.21 (provisions related to alternative cover material requirements).

<sup>42</sup> 40 C.F.R. §258.22 (provisions related to disease vectors).

<sup>43</sup> On June 4, 2003, ECE submitted a request to ADEM for operational changes as follows: 1) for an alternative design for the drainage layer that continued to meet the permeability standard and an equivalent hydraulic flow rate; 2) for leachate recirculation; and 3) for implementation for the use of alternative daily covers. ECE Letter to ADEM, Re: Comments on Draft Permit, June 4, 2003.

<sup>44</sup> Mid-South Testing Inc. Tallassee Waste Disposal Center Inc. Preliminary Environmental Assessment prepared for Whatley Drake LLC (August/September 2000) and Southern Environmental Resources, Inc. Tallassee Waste Disposal Center Inc. Hydrogeologic Evaluation (June 14, 2000).

impacts from metals and various pollutants to a local naturally occurring spring and residential drinking water wells located south, and southeast, respectively, from the landfill property. The consultants' recommendations from these assessments included the need to establish an alternative source of drinking and domestic water as well as utilization of a water purification system for two properties.<sup>45</sup> ADEM concurred with these recommendations.<sup>46</sup>

With respect to whether the continued development of the landfill contributed to the pre-existing safety hazards, the composite liner and leachate collection system were designed to prevent leachate migration into the groundwater.<sup>47</sup> The groundwater monitoring system was designed to evaluate groundwater quality at the landfill property boundary.<sup>48</sup> Moreover, ECRCO found that the permanent and temporary drainage control features were designed to protect surface water quality.

ECRCO did not identify any evidence to suggest that the composite liner and leachate collection system, and the site's permanent and temporary drainage control features in the 2003 modification would contribute to pre-existing hazards. As a result, there is insufficient evidence in the record to show a causal link between the 2003 permit modification and the alleged increased impact on drinking water.

- Tuscaloosa Aquifer:

Complainants raised a concern regarding impact to the Tuscaloosa Aquifer resulting from this permit modification. Impacts to water quality could occur from the land disturbing activities associated with the permit modification. However, the landfill addressed any potential impacts from the facility's drainage and discharges that could result from land disturbing activities through the landfill's construction of measures designed to be protective of human health and the environment – a composite liner and leachate collection system, and the site's permanent and temporary drainage control features that protect surface waters that feed local aquifers.<sup>49</sup> The groundwater monitoring system was designed to detect groundwater impact and evaluate groundwater quality at the landfill property boundary.<sup>50</sup>

Complainants supplied evidence of a sediment erosion control feature that failed due to an extreme storm.<sup>51</sup> ECRCO's investigation found that permanent and temporary sediment control features are designed to control runoff from routine storm events and not designed to manage high volume rain events rising to the level of an "Act of God." ECRCO did not identify any

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<sup>45</sup> Furthermore, the consultants noted that a local water authority provided service to one property, but at the time of their report, this service had not been routed into the residence. *Id.*

<sup>46</sup> ADEM Memorandum, Review of Preliminary Environmental Investigation (January 4, 2001).

<sup>47</sup> ADEM Admin. Code r. §335-13-4-.18 (requirements relating to liners and leachate collection), 40 C.F.R. §258.40 (requirements relating to liners and leachate collection).

<sup>48</sup> ADEM Admin. Code r. §335-13-4-.14 and §335-13-4-.27 (requirements relating to groundwater monitoring systems), 40 C.F.R. §258.51 (requirements relating to groundwater monitoring systems).

<sup>49</sup> ADEM Admin. Code r. §335-13-4-.17 (requirements relating to drainage); §335-13-4-.18 (requirements relating to liners and leachate collection).

<sup>50</sup> ADEM Admin. Code r. §335-13-4-.14 and §335-13-4-.27 (requirements relating to groundwater monitoring systems), 40 C.F.R. §258.51 (requirements relating to groundwater monitoring systems).

<sup>51</sup> Photographs provided by Complainants, March 4, 2016.

evidence to suggest that the composite liner and leachate collection system, the groundwater monitoring system, or the site's permanent and temporary drainage control features did not adequately address any potential impacts from routine storm events to the Tuscaloosa Aquifer. As a result, there is insufficient evidence in the record to show a causal link between the 2003 permit modification and the alleged harm to the water quality of the Tuscaloosa Aquifer.

- Sedimentation Pond and Storm Water Runoff:

While not making an allegation of harm related to the movement of the sedimentation pond, the Complainants did express concern as to why the pond was being moved. Movement of the sedimentation pond facilitated the development of the proposed landfill cells.<sup>52</sup> While the acts carried out under the 2003 permit modification could have contributed to runoff from the landfill, evidence shows that mitigating measures were put in place at the time to address these issues. The movement of the sedimentation pond was requested "to better collect and treat storm water runoff from the site."<sup>53</sup> ADEM reviewed the request and determined that the new sedimentation pond location adequately removed sediments from the storm water runoff prior to release onto adjacent properties or waters, and its relocation would have no adverse impact on quality of surface waters discharged from the site.<sup>54</sup> ECRCO did not identify any evidence to suggest that sediments were not adequately removed from the storm water runoff prior to release. Therefore, there is insufficient evidence to show a causal link between the 2003 permit modification, including the movement of the sedimentation pond, and alleged increased runoff.

- Gleeden Branch and Other Surface Water:

Complainants raised a concern regarding impacts resulting from the 2003 permit modification to Gleeden Branch and other surface waters that eventually contribute to water sources for downstream municipalities. Impacts to water quality could occur from the facility, including the land disturbing activities associated with permit modification; however, the facility's permanent and temporary drainage control features are designed to reduce the impact to surface waters.<sup>55</sup> ECRCO found that, at the time, the management of surface water discharges were addressed by the relocation of the sedimentation pond and other permanent and temporary drainage control features associated with the site's development. Therefore, ECRCO finds insufficient evidence in the record to conclude that there was adverse harm with respect to Gleeden Branch and other surface waters as alleged.

- Farming and Gardens:

A concern was raised "about the impact of the landfill on our farmers' animals and the gardens that people use for food."<sup>56</sup> A subsequent concern was conveyed by Complainants on behalf of

<sup>52</sup> ECE Permit Drawings for Modification of Sunflower Landfill Inc. Cell 2A, Cell 2B, C&D Cell (March 2003).

<sup>53</sup> ADEM, Response to Comments, October 20, 2003, at 4.

<sup>54</sup> ADEM, Response to Comments, October 20, 2003, Response to Comment 10, page 4.

<sup>55</sup> ADEM Admin. Code r. §335-13-4-.17 (requirements relating to drainage); §335-13-4-.18 (requirements relating to liners and leachate collection).

<sup>56</sup> Letter from Phyllis D. Gosa, to Karen D. Higginbotham, Director, OCR (September 3, 2003), includes letter from Phyllis Gosa to James W. Warr, Director, ADEM (August 29, 2003) at 3.

an unnamed landowner about the harm to farming and gardening due to alleged contaminated soil and water from the landfill.<sup>57</sup>

With regard to the 2003 modification, as mentioned above, the composite liner and leachate collection system were designed to prevent leachate migration into the groundwater.<sup>58</sup> The groundwater monitoring system was designed to detect groundwater impacts and evaluate groundwater quality at the landfill's property boundary.<sup>59</sup> Moreover, ECRCO found that the permanent and temporary drainage control features were designed to protect not only surface waters, but also adjoining properties from runoff.

ECRCO did not identify any evidence to suggest that the composite liner and leachate collection system, the groundwater monitoring system, or the site's permanent and temporary drainage control features did not adequately prevent leachate migration into the groundwater or failed to protect adjoining properties from runoff. As a result, there is insufficient evidence in the record to show a causal link between the 2003 permit modification and the alleged harm to farms and gardens on adjoining properties.

## **2. Transportation and Safety Concerns**

Complainants raised concerns about the lack of an evacuation or decontamination plan for the community and inadequate emergency response infrastructure. Complainants also alleged impacts to residents and a local church relating to transportation, including those resulting from traffic and roadway design.

EPA's regulations implementing RCRA Subtitle C require evacuation and decontamination plans for communities at some hazardous waste disposal facilities.<sup>60</sup> The Tallassee Waste Disposal Center, Inc. receives non-hazardous solid waste, such as household garbage and construction and demolition materials which are regulated under RCRA Subtitle D, not Subtitle C. Landfill owners and operators of RCRA D facilities like the Tallassee Waste Disposal Center, Inc. must ensure that the concentration level of explosive gases including methane gas must not exceed the lower explosive limits of methane at the property boundary.<sup>61</sup> Furthermore, ECRCO found that Tallassee Waste Disposal Center, Inc. has an explosive gas monitoring and reporting plan, conducts quarterly monitoring of landfill gas, and has installed a landfill gas control system.<sup>62</sup>

The proposed 2003 permit modification did not impose any new or modified roadway, safety, emergency response, roadway setbacks, or other transportation conditions. The proposed permit modification did not alter the existing landfill service area or the truck route for landfill access. Furthermore, the proposed permit modification did not request an adjustment in the daily waste

<sup>57</sup> February 10, 2016 Interview with Complainants.

<sup>58</sup> ADEM Admin. Code r. §335-13-4-.18 (requirements relating to liners and leachate collection), 40 C.F.R. §258.40 (requirements relating to liners and leachate collection)

<sup>59</sup> ADEM Admin. Code r. §335-13-4-.14 and §335-13-4-.27 (requirements relating to groundwater monitoring systems), 40 C.F.R. §258.51 (requirements relating to groundwater monitoring systems).

<sup>60</sup> 40 C.F.R. Part 267, Subpart D, *Contingency Plan and Emergency Procedures*.

<sup>61</sup> ADEM Admin. Code r. §335-13-4-.16; 40 C.F.R. Part 258.23.

<sup>62</sup> *Explosive Gas Monitoring and Reporting Plan*, Appendix N of the Tallassee Waste Disposal Center Solid Waste Disposal Facility Permit Application, June 2000.



acceptance rates (which remained at 1,500 tons per day) or the types of waste approved for acceptance at the Tallassee Waste Disposal Center, Inc. ECRCO found that issues relating to the proximity to the church, roadway design, line of sight, signage, and traffic speed enforcement, and emergency infrastructure are not impacted by the permit modification. Instead, for example, the specific route used by trucks in proceeding to the landfill was addressed by the 1999 local host agreement between the operator and Tallapoosa County,<sup>63</sup> which was in effect at the time of the 2003 permit modification. As a result, there is insufficient evidence to show a causal link between the 2003 permit modification and the alleged harm resulting from traffic and roadway design.

### **3. Non Environmental Concerns Raised by Complainants**

Complainants raised concerns related to diminution of property values, displacement of landowners, and stigma of living near a landfill, and that these were impacted by the 2003 permit modification actions. For its part, EPA has substantial discretion to determine the types of harms, on a case by case basis, that warrant investigatory resources and are sufficiently harmful to violate Title VI.<sup>64</sup> ECRCO determined that it would not investigate substantively the alleged harms of diminution of property values, displacement of landowners, and stigma of living near a landfill in this instance because, although the 2003 permit modification activities (*i.e.* the development of cells 2A and 2B, the C&D unit, and the associated sediment and erosion control units) could conceivably have resulted in diminution of property values, displacement of landowners, and contributed to stigma, there is insufficient evidence in the record to suggest that the permit modification actions themselves resulted in a sufficiently significant harm with regard to stigma, displacement of landowners and property values. Instead, as previously noted, Complainants' allegations of harm generally, and with respect to these identified concerns in particular, appear to be related to the initial permitting and siting of the Tallassee Waste Disposal Center in 2001, rather than to the 2003 permit modification at issue in this case.

### **Conclusion**

For the reasons set forth above, the record does not establish a *prima facie* case of discrimination based on disparate impact with respect to allegations set forth in this complaint regarding the 2003 permit modification. Accordingly, ECRCO finds insufficient evidence to conclude that ADEM violated Title VI and EPA's nondiscrimination regulation in regard to the 2003 permit modification at issue in this case. In light of the findings set forth in this letter, this case is closed as of the date of this letter.

While there is insufficient evidence for finding a violation of EPA's nondiscrimination regulation relative to the specific issue raised in this case and the 2003 permit modification

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<sup>63</sup> Tallapoosa County Commission. Local Host Agreement (November 15, 1999). This agreement specified a particular route that traffic was to take to the landfill. The application for the 2003 permit modification did not request changes to this route.

<sup>64</sup> *See Choate*, 469 U.S. at 293–94: “Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impact upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.” *See also Alexander v. Sandoval*, 532 U.S. 275, 306 (2001) (Stevens, J., dissenting).

Director Lance LeFleur

Page 16

actions, ECRCO has continued to hear community concerns regarding alleged discrimination relating to environmental permitting actions in Alabama, including with respect to whether ADEM examines the decision-making processes of the local host governments and the regional planning authorities relative to permitting actions. In addition, ECRCO has received information and complaints with respect to ADEM's public participation program as well as ADEM's implementation of a foundational non-discrimination program that establishes appropriate procedural safeguards for addressing civil rights complaints and implementing policies and procedures to ensure access for persons with disabilities and limited-English proficiency to ADEM programs and activities. These allegations, filed formally with ECRCO as separate complaints against ADEM and/or voiced during interviews or provided as documentary evidence as part of this investigation, raise broader systemic issues regarding ADEM's methods of administering its solid waste permitting process in general, as well as its non-discrimination program. Accordingly, ECRCO will be contacting ADEM to discuss these issues and possible options for addressing them through the resolution of the pending complaints.

This letter sets forth ECRCO's disposition of EPA File No. 06R-03-R4. This letter is not a formal statement of ECRCO policy and should not be relied upon, cited, or construed as such. This letter and any findings herein do not affect ADEM's continuing responsibility to comply with Title VI or other federal non-discrimination laws and EPA's regulation at 40 C.F.R. Part 7, including §7.85, nor do they affect EPA's investigation of any Title VI or other federal civil rights complaints or address any other matter not addressed in this letter.

If you have any questions, please feel free to contact me at (202) 564-9649, by e-mail at [dorka.lilian@epa.gov](mailto:dorka.lilian@epa.gov), or U.S. mail at U.S. EPA, Office of General Counsel, External Civil Rights Compliance Office (Mail Code 2310A), 1200 Pennsylvania Avenue, N.W., Washington, D.C., 20460.

Sincerely,



Lilian S. Dorka, Director  
External Civil Rights Compliance Office  
Office of General Counsel

cc: Kenneth Redden  
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Vickie Tellis  
Acting Assistant Regional Administrator  
Acting Deputy Civil Rights Official  
U.S. EPA Region 4

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
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EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE  
OFFICE OF GENERAL COUNSEL

March 1, 2018

**Return Receipt Requested**

Certified Mail #: 7015 3010 0001 1267 2828

**In Reply Refer to:**

EPA File No. 12R-13-R4

Lance LeFleur, Director  
Alabama Department of Environmental Management  
P.O. Box 301463  
Montgomery, Alabama 36130-1463

**Re: Closure of Administrative Complaint, EPA File No. 12R-13-R4**

Dear Director LeFleur:

This letter is to notify you that the U.S. Environmental Protection Agency's (EPA) External Civil Rights Compliance Office (ECRCO) is resolving and closing, as of the date of this letter, the administrative complaint filed with EPA on June 3, 2013, and the retaliation allegation filed on August 19, 2016, against the Alabama Department of Environmental Management (ADEM). The complaints generally alleged that ADEM violated Title VI of the Civil Rights Act of 1964, as amended, 42 United States Code 2000d et seq. (Title VI) and the EPA's nondiscrimination regulation found at 40 Code of Federal Regulations (C.F.R.) Part 7. With respect to the specific issues addressed in this case, EPA ECRCO finds insufficient evidence to conclude that ADEM violated Title VI and EPA's nondiscrimination regulation.

EPA ECRCO is responsible for enforcing several federal civil rights laws that prohibit discrimination on the bases of race, color, national origin (including limited-English proficiency), disability, sex, and age in programs or activities that receive federal financial assistance from the EPA. On June 27, 2013, EPA's Office of Civil Rights (OCR)<sup>1</sup> accepted for investigation two issues raised in a May 2013 complaint (hereinafter referred to as the "May 2013 issues").<sup>2</sup> The two issues were:

Whether ADEM violated Title VI and EPA's implementing regulations on September 27, 2011, by reissuing Permit No. 53-03 to Perry County Associates, LLC to construct and operate the Arrowhead municipal solid waste landfill in Perry County, Alabama, because

<sup>1</sup> EPA's Office of Civil Rights is now identified as the External Civil Rights Compliance Office.

<sup>2</sup> Letter from Vicki Simons, Director, OCR (signed by Helena Wooden-Aguilar, External Compliance Assistance Director) to David Ludder, Complainant, Acceptance of Administrative Complaint (June 27, 2013).

Director LeFleur

Page 2

the Arrowhead Landfill permit renewal will adversely and disparately impact the African-American residents in the nearby community; and

Whether ADEM violated Title VI and EPA's implementing regulations on February 3, 2012, by authorizing a permit modification to expand the disposal area of the Arrowhead municipal solid waste landfill in Perry County, Alabama, by 169.17 acres (66%), because the modification will have the effect of adversely and disparately impacting the African-American residents in the surrounding community.

ECRCO investigated the May 2013 issues and finds that the record evidence does not establish a prima facie case of discrimination based on disparate impact. Accordingly, ECRCO finds insufficient evidence to conclude that ADEM violated Title VI and EPA's nondiscrimination regulation in regard to the 2011 permit reissuance and 2012 permit modification.

While not legally required, ECRCO believes that ADEM could increase its leadership role by bringing together the Arrowhead community, permittees, as well as other local government entities to share important information, ensure that its citizens and stakeholders understand roles, rights and responsibilities and address issues constructively. If ADEM voluntarily chooses to play a leadership role and identify stakeholders in the affected community, although these actions are not legally required, ECRCO recommends ADEM make a concerted effort to create and/or re-engage partnerships with private and public entities to share information on its website and through standard media outlets. Such information sharing would ideally include the relevant community in the geographic area near the Arrowhead Landfill and those individuals and groups that have previously expressed an interest in environmental decision-making activities; environment and environmental justice organizations; religious institutions and organizations; public administration, environmental, law and health departments at colleges and universities; tribal governments; and relevant community service organizations.

In 2016, ECRCO received an additional allegation and accepted for investigation, to be addressed within the existing complaint:

Whether ADEM's actions or inactions, violated 40 C.F.R. § 7.100, which prohibits intimidating, threatening, coercing, or engaging in other discriminatory conduct against any individual or group because of actions taken and/or participation in an action to secure rights protected by the non-discrimination statutes OCR enforces.

ECRCO investigated the retaliation issue and finds insufficient evidence of discrimination based on retaliation. However, as more fully discussed below, although these actions are not legally required, we recommend ADEM improve its nondiscrimination complaint processes for addressing and resolving retaliation complaints. In addition, we believe there are ways for ADEM to improve the underlying processes and environmental complaint determinations which form the basis for some of Complainant's claims of retaliation.

Background

In conducting this investigation, ECRCO reviewed available information, including the original complaint submitted to ECRCO, ADEM's responses to ECRCO's acceptance of the complaint and requests for information, and all other supplemental information submitted to ECRCO through telephone interviews and conversations, letters, and emails by the Complainant and Recipient pertaining to the Arrowhead Landfill. ECRCO reviewed studies, water sample reports, and air quality modeling and dust sample reports. In addition, ECRCO conducted a site visit to Uniontown in August 2014. During the site visit, ECRCO conducted 14 in-person interviews with the complainants as well as with 6 other witnesses. ECRCO also conducted several telephonic interviews from 2014 to present day.

The ECRCO investigation included a review of ADEM's regulations<sup>3</sup> and administrative codes,<sup>4</sup> permitting documents, and inspection reports. In particular, ECRCO reviewed permit applications and correspondences; facility engineering designs and modification as completed by the facility's primary engineering consulting firms Jordan Jones & Goulding, Inc.; and, Hodges, Harbin, Newberry & Tribble, Inc. (HHNT); monitoring data and inspection reports, air permit applications, wetlands applications and certifications, waste acceptance certifications, operating permits, and public hearing transcripts. ADEM additionally submitted a copy of a legislated solid waste study completed by Auburn University.<sup>5</sup>

During the course of this investigation, ECRCO reviewed the Arrowhead Landfill's original engineering designs, including site suitability study, site layout, original surface and groundwater sampling reports, financial assurances, and host agreements/contracts. According to ECRCO's review, the Arrowhead Landfill is designed to meet the minimum design and operating standards for municipal solid waste (MSW) landfills.<sup>6</sup> For its part, ADEM has conducted regulated inspections of the Arrowhead Landfill and documented compliance and noncompliance issues and reviewed the Arrowhead's Landfill's waste certifications. ADEM has reviewed and approved permitting and operational variances for the Arrowhead Landfill, including operator requirements, alternative daily cover, and leachate recirculation, and has approved alternative daily covers for the Arrowhead Landfill.<sup>7</sup>

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<sup>3</sup> ADEM Admin. Code r. 335-3-19, and 335-13.

<sup>4</sup> The Code of Alabama 1975, Title 22, Chapter 27.

<sup>5</sup> Auburn University, *Administrative & Technical Support in Evaluating Public Input on Potential Enhancements to the State Solid Waste Program, Phase II. Framework for Changing Alabama's Approach to Solid Waste Management* (Final Report), November 3, 2013.

<sup>6</sup> 40 C.F.R. Part 258 and ADEM Admin. Code r. 335-13-4

<sup>7</sup> At the time of ECRCO's review, ECRCO found no Notices of Violations (NOVs) or Administrative Orders (AO) included in the available information reviewed. The reviews of the regulatory website did not show any non-compliance issues related to the state issued permits. Arrowhead Landfill, at the time of ECRCO's review, had permits for solid waste disposal, surface water discharges, wetlands, and air quality. Although no new permits were issued, Prevention of Significant Deterioration (PSD) and New Source Performance Standards (NSPS) evaluations have been completed.

## I. The May 2013 Issues

### *Legal Standard*

EPA's investigation was conducted under the authority of Title VI of the Civil Rights Act of 1964, and EPA's nondiscrimination regulation (40 C.F.R. Part 7) and consistent with EPA's Case Resolution Manual.<sup>8</sup> EPA's regulation at 40 C.F.R. §7.35(b) states, in relevant part, that "A recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, or national origin."

With respect to the May 2013 issues ECRCO analyzed whether ADEM's methods of administering its permitting program had an adverse and disparate impact on the African-American residents in the surrounding community, in violation of Title VI, under a *disparate impact* or *discriminatory effects* standard.<sup>9</sup> In a disparate impact case, EPA must determine whether the recipient used a facially neutral policy or practice that had a sufficiently adverse (harmful) and disproportionate effect based on race, color, or national origin. This is referred to as the *prima facie* case. To establish an adverse disparate impact, EPA must:

- (1) identify the specific policy or practice at issue;
- (2) establish adversity/harm;<sup>10</sup>
- (3) establish disparity;<sup>11</sup> and
- (4) establish causation.<sup>12</sup>

<sup>8</sup> Case Resolution Manual (Jan. 2017), at [https://www.epa.gov/sites/production/files/2017-01/documents/final\\_epa\\_oge\\_ecrco\\_crm\\_january\\_11\\_2017.pdf](https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_oge_ecrco_crm_january_11_2017.pdf).

<sup>9</sup> See, e.g., *Guardians Ass'n. v. Civil Serv. Comm'n*, 463 U.S. 582, 593 (1983) (concluding that Title VI reaches unintentional, disparate impact as well as intentional discrimination); *Alexander v. Choate*, 469 U.S. 287, 293 (1985) (confirming that, under *Guardians*, agencies enforcing Title VI can address disparate impact discrimination). Many subsequent cases have also recognized the validity of Title VI disparate impact claims. See, e.g., *Villanueva v. Carere*, 85 F.3d 481, 486 (10th Cir. 1996) (citing *Guardians*); *New York Urban League v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *Chicago v. Lindley*, 66 F.3d 819, 827-28 (7th Cir. 1995); *David K. v. Lane*, 839 F.2d 1265, 1274 (7th Cir. 1988) (internal citations omitted); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985); *Larry P. v. Riles*, 793 F.2d 969, 982, fn.10 (9th Cir. 1984). In addition, by memorandum dated July 14, 1994, the Attorney General directed the Heads of Departments and Agencies to "ensure that the disparate impact provisions in your regulations are fully utilized so that all persons may enjoy equally the benefits of [f]ederally financed programs." Attorney General Memorandum on the use of the Disparate Impact Standard in Administrative Regulations under Title VI of the Civil Rights Act of 1964 (July 14, 1994) (<http://www.justice.gov/ag/attorney-general-july-14-1994-memorandum-use-disparate-impact-standard-administrative-regulations>). U.S. EPA's External Civil Rights Compliance Office Toolkit, p. 4 (January 18, 2007). [https://www.epa.gov/sites/production/files/2017-01/documents/toolkit-chapter1-transmittal\\_letter-faqs.pdf](https://www.epa.gov/sites/production/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf)

<sup>10</sup> Adversity exists if a fact specific inquiry determines that the nature, size, or likelihood of the impact is sufficient to make it an actionable harm. U.S. EPA's External Civil Rights Compliance Office Toolkit, p. 4

<sup>11</sup> In analyzing disparity, EPA analyzes whether a disproportionate share of the adversity/harm is borne by individuals based on their race, color, national origin, age, disability or sex. A general measure of disparity compares the proportion of persons in the protected class who are adversely affected by the challenged policy or decision and the proportion of persons not in the protected class who are adversely affected. See *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 576-77 (2d Cir. 2003) (internal citations omitted).

<sup>12</sup> See *N.Y.C. Envtl. Justice All. v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000) (plaintiffs must "allege a causal connection between a facially neutral policy and a disproportionate and adverse impact on minorities").

The focus here is on the consequences of the recipient's policies or decisions, rather than the recipient's intent.<sup>13</sup> The neutral policy or decision at issue need not be limited to one that a recipient formalizes in writing, but also could be one that is understood as "standard operating procedure" by recipient's employees.<sup>14</sup> Similarly, the neutral practice need not be affirmatively undertaken, but in some instances could be the failure to take action, or to adopt an important policy.<sup>15</sup>

If the evidence establishes a prima facie case of adverse disparate impact, as discussed above, EPA must then determine whether the recipient has articulated a "substantial legitimate justification" for the challenged policy or practice.<sup>16</sup> "Substantial legitimate justification" in a disparate impact case is similar to the Title VII employment concept of "business necessity," which in that context requires a showing that the policy or practice in question is demonstrably related to a significant, legitimate employment goal.<sup>17</sup> The analysis requires balancing recipients' interests in implementing their policies with the substantial public interest in preventing discrimination.<sup>18</sup>

If a recipient shows a substantial legitimate justification for its policy or decision, EPA must also determine whether there are any comparably effective alternative practices that would result in less adverse impact. In other words, are there less discriminatory alternatives?<sup>19</sup> Thus, even if a recipient demonstrates a substantial legitimate justification, the challenged policy or decision will nevertheless violate federal civil rights laws if the evidence shows that less discriminatory alternatives exist.<sup>20</sup>

### *Analysis*

If EPA does not have sufficient evidence to establish a prima facie case of adverse disparate impact, as explained above, it cannot determine that the recipient has engaged in discrimination. To determine whether an adverse disparate impact occurred as a result of ADEM's reissuance

<sup>13</sup> *Lau v. Nichols*, 414 U.S. 563, 568 (1974).

<sup>14</sup> U.S. EPA's External Civil Rights Compliance Office Toolkit, January 18, 2017, p. 9.

<sup>15</sup> See, e.g., *Maricopa Cty.*, 915 F. Supp. 2d 1073, 1079-81 (D. Ariz. 2012) (finding that plaintiffs stated a claim of disparate impact violation based on national origin where recipient "failed to develop and implement policies and practices to ensure [limited English proficient] Latino inmates have equal access to jail services" and discriminatory conduct of detention officers was facilitated by "broad, unfettered discretion and lack of training and oversight" resulting in denial of access to important services).

<sup>16</sup> *Georgia State Conf.*, 775 F.2d at 1417. See also, *Patterson v. McLean Credit Union*, 491 U.S. 164, 186-87 (noting the framework for proof developed in civil rights cases), citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>17</sup> *Wards Cove Packing Inc. v. Antonio*, 490 U.S. 642, 659-660 (1989); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). The concept of "business necessity" does not transfer exactly to the Title VI context because "business necessity" does not cover the full scope of recipient practices that Title VI covers, which applies far more broadly to many types of public and non-profit entities. See *Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507, 2522-24 (2015) (recognizing the limitations on extension of the business necessity concept to Fair Housing Act complaints).

<sup>18</sup> See, Department of Justice Title VI Legal Manual, Section VII: Proving Discrimination – Disparate Impact, §C.2, <https://www.justice.gov/crt/fcs/T6Manual7#U>.

<sup>19</sup> *Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993). U.S. EPA's External Civil Rights Compliance Office Toolkit, p. 9.

<sup>20</sup> U.S. EPA's External Civil Rights Compliance Office Toolkit, p. 9.

Director LeFleur

Page 6

and subsequent modification of the permit, ECRCO examined whether the alleged harms were indeed adverse harms and whether there was a causal connection between the specific permitting actions related to the Arrowhead Landfill and the alleged adverse harms. As discussed more specifically below, as to each of the alleged harms relating to the 2011 and 2012, permit reissuance and permit modification, respectively and current Landfill operations, ECRCO finds insufficient evidence to establish a prima facie case of adverse disparate impact discrimination.

### Alleged ADEM Discriminatory Policy or Practice

#### *September 2011 (Permit #53-03)*

On September 27, 2011, ADEM made a determination to renew Permit #53-03, which is a Solid Waste Disposal Facility Permit for the Arrowhead Landfill. The permitted facility boundaries consist of approximately 976.97 acres with ~256.151 acres permitted for disposal operations.<sup>21</sup>

#### *February 2012 (Permit #53-03)*

On February 3, 2012, ADEM approved the modification that increased the disposal acreage from ~256.151 acres to ~425.33 acres. The modification would result in an increase of 169.179 acres permitted for disposal operations. The permitted facility boundaries remained ~976.97 acres.<sup>22</sup>

The types of waste accepted, service area, and daily accepted waste volumes and the Landfill boundaries that were permitted, remained unchanged during this modification.

### The Alleged Harms

The alleged harms that relate to the 2013 accepted issues were identified in two general categories – health-related and non-health related.<sup>23</sup> The health-related impacts included alleged harms stemming from the Landfill's effects on air quality and water quality. During the investigation, complainants also raised concerns about coal ash and its impact on their health and well-being. The non-health related impacts included degradation of the cemetery, increased roaming wild-life and dogs entering and exiting the Landfill property from lack of a fence, and diminution of property values. For purposes of analyzing whether there is a prima facie case of discrimination based on disparate impacts, ECRCO has grouped the alleged harms into health-related and non-health related subject headings to describe its review of evidence gathered to review potential disparate impact.

<sup>21</sup>Municipal Solid Waste Landfill Permit Renewal 53-03 issued September 27, 2011; ADEM File No. 17668\_53-03\_105\_20110927\_PERM\_Permit.pdf.

<sup>22</sup>Municipal Solid Waste Permit Modification 53-03 modification date November 4, 2011 and February 3, 2012; ADEM's Enforcement and Compliance Information eFile File Name 17668\_53-03\_105\_20120203\_PERM\_Permit.pdf.

<sup>23</sup>Title VI Civil Rights Complaint and Petition for Relief or Sanction- Alabama Department of Environmental Management Permitting of Arrowhead Landfill in Perry County, Alabama (EPA OCR File No. 01R-12-R4) from David A. Ludder, to Vicki Simons, Director, Office of Civil Rights (May 30, 2013).



### Health-Related Impacts

- Air Related

Complainants raised concerns during the course of the investigation about the Landfill and its effect on air quality and their health. Some of the described health impacts included aggravation of asthma, wheezing, shortness of breath, sinus problems, persistent coughing, sore throats, runny eyes, respiratory issues, nosebleeds, headaches, and additional health impacts.<sup>24</sup> Complainants also raised concerns regarding acrid smell; increased dust in the air and negative impacts on vegetation. In regards to odor, Complainants have submitted a number of declarations which describe the smell as “heavy, stinky, horrible, powerful, foul, like ammonia, acrid, stench of rotten eggs, etc.”<sup>25</sup> The Complainants have also described the effects of the odor, and stated that it has caused nausea and hindered outside activity.<sup>26</sup>

As part of ECRCO’s *prima facie* analysis of “adverse harm,” it reviewed an environmental report submitted by Complainants – the Stone Lions Environmental Corporation Report (“Stone Lions Report”)<sup>27</sup> which included an air dispersion modeling study of the atmospheric emissions of total suspended solids, hydrogen sulfide, and non-methane organic compounds from the Arrowhead Landfill and the analysis of dust wipe and water samples submitted by the Complainant.<sup>28</sup> In addition, the Stone Lions Report attempted to correlate its study data to alleged health impacts and other harms in the community. For example, the Stone Lions Report states that hydrogen sulfide (H<sub>2</sub>S) and total suspended particulates (TSP) air emissions at the Arrowhead Landfill resulted in a significant negative impact on the neighborhoods near the Landfill boundaries.<sup>29</sup>

In order to review the scientific methodology used for this study and the conclusions reached with respect to environmental and health impacts, ECRCO consulted environmental technical experts across EPA, including the Office of Air and Radiation, Office of Research and Development, Office of Land and Emergency Management, both in EPA headquarters and Region 4.<sup>30</sup> The EPA experts assisted with the assessment of available records and reports;

<sup>24</sup> *Id.* Information also gathered through telephonic and in-person interviews conducted by ECRCO between 2014 through 2017 with Complainants.

<sup>25</sup> Letter from Marianne Engelman Lado, Senior Staff Attorney to Velveta Golightly-Howell, Director and Jeryl Covington, Acting Assistant Director, Office of Civil Rights, USEPA. (March 8, 2016).

<sup>26</sup> ECRCO did not review Complainants’ medical records to confirm the reports of health impacts nor did ECRCO conduct a health survey of the Landfill’s adjacent residents as part of this investigation.

<sup>27</sup> Letter from David A. Ludder, Attorney for Complainants to Ms. Vicki Simons, Director, Office of Civil Rights, U.S. Environmental Protection Agency. (May 30, 2013). See (Exhibit T3) Stone Lion’s Environmental Corporation Report: An Evaluation of Particulate Matter, Hydrogen Sulfide, and Non-Methane Organic Compounds from the Arrowhead Landfill. (August 13, 2012).

<sup>28</sup> Adam Johnston, Creek Keepers’ Wipe and Water Sample Results February 24, 2011.

<sup>29</sup> Stone Lions Report, at p.6.

<sup>30</sup> See ECRCO Case Resolution Manual, at Chapter 1 – Deputy Civil Rights Officials and Title VI Case Management Protocol Orders (January 2017), at [https://19january2017snapshot.epa.gov/sites/production/files/2017-01/documents/final\\_epa\\_ogc\\_ecrco\\_crm\\_january\\_11\\_2017.pdf](https://19january2017snapshot.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf). EPA Orders 47003 and 47014 establish a protocol for processing complaints of discrimination that brings program and regional offices throughout the agency into a collaborative process for coordinating and committing the analytical resources, expertise, and technical support

Director LeFleur

Page 8

evaluated the Arrowhead Landfill's regulatory compliance; and reviewed the methodology and analysis utilized in the Stone Lions Report.

Specifically, the EPA experts conducted a review of the air dispersion model and calculations contained in the Stone Lions Report, and the dust wipe and water samples analyses submitted as part of the administrative complaint. Based on the review of this information, the EPA experts identified a number of deficiencies in how the modeling was conducted, including uncontrolled sample collection techniques, improper collection protocols, and inadequate quality control regarding documentation of sample locations and collection and handling methods.<sup>31</sup> Based on the deficiencies identified by the EPA experts, ECRCO determined that it could not rely on the Stone Lions Report modeling data and the Report's attempt to correlate its study data to alleged health impacts and other harms in the community.

To determine the air quality compliance status of the Arrowhead Landfill, the EPA experts assessed the permitting obligations for the Arrowhead Landfill. The Arrowhead Landfill is subject to the New Source Performance Standard (NSPS) Subpart WWW which addresses Standards of Performance for Municipal Solid Waste Landfills that commenced construction, reconstruction or modification on or after May 30, 1991.<sup>32</sup> This rule requires the owner/operator of a MSW landfill having a design capacity equal to or greater than 2.5 million megagrams and 2.5 million cubic meters to calculate the emission rate of non-methane organic compounds (NMOCs) and provide an annual report to the delegated authority.<sup>33</sup> At time of ECRCO's review and based upon the volume of in-place waste in 2014<sup>34</sup> and the review of available documents, the Arrowhead Landfill had never reported an NMOC emission rate equal to or greater than 50 megagrams per year (Mg/yr.) and therefore has no regulatory requirement for the installation of an active air pollution control device in order to maintain compliance with NSPS Subpart WWW. There were no additional air quality permit requirements at that time.

The EPA experts reviewed the air quality regulatory standards or requirements. Based on this review, there is a daily PM<sub>10</sub> National Ambient Air Quality Standard (NAAQS) of 150

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needed to address civil rights compliance. Although ECRCO retains the primary authority and responsibility for carrying out the civil rights program, the orders clearly emphasize a "One-EPA" commitment with the support of a network of Deputy Civil Rights Officials (DCROs) established under Order 4700, to support the civil rights mission and ensure its success throughout EPA. The 2013 protocol (Order 4701) anticipated that ECRCO would develop specific procedures to improve implementation of the protocol and ensure the prompt, effective, and efficient resolution of civil rights cases. *Id.* at p.ii.

<sup>31</sup> See Stone Lions Report, at pp.2-6 (e.g., incorrectly equating total suspended particulates to PM<sub>10</sub> throughout the report, calculations and map; analysis assumptions incorrect and/or improperly assumed; assumption of NMOC generation from coal ash is incorrect and the calculations are based on the coal ash emissions being similarly equal to emissions from MSW landfills).

<sup>32</sup> Code of Federal Register Title 40, Chapter I, Subchapter C, Part 60, Subpart WWW (40 C.F.R. 60 Subpart WWW).

<sup>33</sup> Per 40 C.F.R. §60.751 Design capacity means the maximum amount of solid waste a landfill can accept, as indicated in terms of volume or mass in the most recent permit issued by the State, local, or Tribal agency responsible for regulating the landfill, plus any in-place waste not accounted for in the most recent permit.

<sup>34</sup> The in-place waste volume is the maximum composition of volume deposited within the disposal unit. At the time of the ECRCO investigation, the maximum volume of in-place waste occurred in 2014. The in-place waste volume is the determinate to calculate the emission rate of NMOC and to assess the point of compliance for the MSW landfill subject to 40 C.F.R. 60 Subpart WWW.

micrograms per cubic meter ( $\mu\text{g}/\text{m}^3$ ). In addition to the  $\text{PM}_{10}$  NAAQS, there is a  $\text{PM}_{10}$  Prevention of Significant Deterioration (PSD) Class II increment of  $30 \mu\text{g}/\text{m}^3$  for 24-hour and  $17 \mu\text{g}/\text{m}^3$  for an annual period. The more recent NAAQS standard is  $\text{PM}_{2.5}$ . The NAAQS for  $\text{PM}_{2.5}$  includes annual ( $12 \mu\text{g}/\text{m}^3$ ) and 24-hour ( $35 \mu\text{g}/\text{m}^3$ ) values; and Class II PSD increment includes annual ( $4 \mu\text{g}/\text{m}^3$ ) and 24-hour ( $9 \mu\text{g}/\text{m}^3$ ) increments. The Arrowhead MSWLF is located in Perry County, Alabama, which is designated as attainment or unclassifiable/attainment for the  $\text{PM}_{10}$  and  $\text{PM}_{2.5}$  NAAQS.<sup>35</sup>

The EPA has monitoring regulations which prescribe the number of required air monitors for individual pollutants as a function of population and ambient concentration levels (i.e., proximity to the NAAQS) – see 40 CFR Part 58, Appendix D. For  $\text{PM}_{2.5}$  and  $\text{PM}_{10}$ , there is no requirement that the State of Alabama operate air monitors in Perry County. The  $\text{PM}_{10}$  measurements taken at the Arrowhead MSWLF during the period when coal ash was being disposed were done voluntarily by the Landfill's contractor.

The Arrowhead Landfill utilizes a SidePak™ Personal Aerosol Monitor to measure particulate matter ( $\text{PM}_{10}$ ).<sup>36</sup> This aerosol monitoring equipment is not a federal reference or equivalent method (FRM/FEM)  $\text{PM}_{10}$  sampler. Nevertheless, the 2010  $\text{PM}_{10}$  data found in the ADEM documents do not appear to have exceeded the daily  $\text{PM}_{10}$  NAAQS of  $150 \mu\text{g}/\text{m}^3$ . As noted previously, however, the data were not collected using FRM/FEM samplers and EPA experts would not necessarily consider the data comparable to the daily  $\text{PM}_{10}$  NAAQS. No monitoring data for  $\text{PM}_{2.5}$  were provided.

In regards to odor, the Arrowhead Landfill operates 25 solar powered gas vent flares for the Landfill leachate collection system cleanout vents to mitigate odors.<sup>37</sup> The gas vent flares are not required by federal or state regulations, but are recognized mitigation techniques<sup>38</sup> to eliminate the potential release of odors. During past inspections, ADEM inspectors have not noted any problems with these flares during annual compliance evaluations.<sup>39</sup>

Based on the foregoing evidence, ECRCO was not able to establish a causal connection between the adverse harms alleged and the permitting actions underlying the May 2013 issues and the operations of the Arrowhead Landfill. While compliance with environmental laws does not necessarily constitute compliance with federal civil rights laws, EPA recognizes a number of forms and types of evidence that could establish causation, including scientific proof of a direct

<sup>35</sup> An "attainment" designation means the area is meeting the standard and not contributing to a nearby violation. As required by the Clean Air Act, states and tribes submit recommendations to the EPA as to whether or not an area is attaining the national ambient air quality standards (NAAQS) for criteria pollutants. The states and tribes base these recommendations on air quality data collected from monitors at locations in urban and rural settings as well as other information characterizing air quality such as modeling. After working with the states and tribes and considering the information from air quality monitors, and/or models, EPA will "designate" an area as attainment or nonattainment for the standard.

<sup>36</sup> <http://www.tsi.com/sidepak-personal-aerosol-monitor-am510/>

<sup>37</sup> ADEM's Enforcement and Compliance Information eFile File Name: 17668\_53-03\_105\_20100211\_PERM\_Gas\_Vent\_Flares.pdf

<sup>38</sup> EPA/452/B-02-001, VOC Controls (OAQPS Sept. 2000)

<sup>39</sup> ADEM's Enforcement and Compliance Information eFile File Name: 17668\_53-03\_105\_20100211\_PERM\_Gas\_Vent\_Flares.pdf

link, prediction of potentially significant exposures and risks resulting from stressors created by the permitted activities or other sources, and other complex methodologies.<sup>40</sup> In this case, ECRCO also considered the complaint, supplemental information, information from a site visit, interviews, a review of ADEM's regulations and administrative codes, permitting documents, inspection reports, studies, and air quality modeling and dust sample reports. Here, the site-specific information did not establish that any alleged harms were caused by the permitting actions. Because causation was not established, and therefore no *prima facie* case of discrimination, ECRCO did not examine disparity and adversity.

- Water Related

Complainants raised concerns about the quality of drinking water from both public drinking water systems and of their personal wells.<sup>41</sup> Specifically, Complainants state that the well water near the Landfill does not smell clean and that city drinking water comes out brown and dirty looking.<sup>42</sup> Complainants state that the uncertainty has led them to drinking bottled water because of their concerns about their water quality since the Landfill arrived.<sup>43</sup> In addition, Complainants state that bathing with city water causes itchiness.<sup>44</sup> Lastly, the alleged adverse impacts include risks of injury to health, the cost of bottled water, and anxiety related to the quality of water. Complainants also stated that "other visitors to the Landfill have noticed water draining from the Landfill in proximity to the mountain of coal ash on the site that appear to be unpermitted."<sup>45</sup>

With regard to water quality, ECRCO found that Arrowhead Landfill conducts detection monitoring of the groundwater, as regulated, on a semi-annual basis.<sup>46</sup> The groundwater analysis is conducted by a third-party, certified laboratory and submitted to ADEM. The detection monitoring system consists of a system of groundwater monitoring wells installed at appropriate locations and depths to yield groundwater samples from the uppermost aquifer in a manner that meets the requisite regulatory criteria for groundwater detection monitoring systems.<sup>47</sup> As a permit condition, the Landfill also conducts regular surface water monitoring.<sup>48</sup>

In addition to monitoring, the Landfill, as required by RCRA Subtitle D, utilizes a composite liner, consisting of two components: a flexible membrane liner (FML) made of 60-mil thick high density polyethylene (HDPE), installed in direct and uniform contact with an underlying two-

<sup>40</sup> U.S. Department of Justice Title VI Legal Manual, Section VII (Proving Discrimination – Disparate Impact), at (C)(1)(d), at <https://www.justice.gov/crt/fes/T6Manual7>.

<sup>41</sup> Letter from Marianne Engelman Lado, Senior Staff Attorney to Velveta Golightly-Howell, Director and Jeryl Covington, Acting Assistant Director, Office of Civil Rights, USEPA. (March 8, 2016). Information also gathered through telephonic and in-person interviews conducted by ECRCO between 2014 through 2017 with Complainants.

<sup>42</sup> *Id.* at page 8.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at page 10.

<sup>46</sup> Detection monitoring for appendix I constituents is required at MSWLF units. The monitoring frequency for all constituents listed in appendix I shall be at least semiannual during the active life of the facility (including closure) and the post-closure period. 40 C.F.R. §258.54 and ADEM Admin. Code r. 335-13-4-.27(3)(b)1.

<sup>47</sup> 40 C.F.R. 258 Subpart E and ADEM Admin. Code r. 335-13-4-.27.

<sup>48</sup> Water Division of ADEM has issued two (2) General National Pollutant Discharge Elimination System (NPDES) storm water permits (ALG160167 and ALG140902).

foot layer of compacted soil with a hydraulic conductivity of not more than  $1 \times 10^{-7}$  cm/sec.<sup>49</sup> Constructed on top of the composite liner is a leachate collection system that allows for the removal of leachate from the Landfill for proper treatment and/or disposal.<sup>50</sup>

The EPA experts and ECRCO reviewed information from the U.S. Geological Survey to identify the regional geology and the potential subsurface areas of concerns. This review showed that the Landfill location has natural features which provide protection for area groundwater. Specifically, the Arrowhead Landfill is underlain by Late Cretaceous-age Coastal Plain sediments comprised of the Selma Group (primarily chalk formations) overlying the Eutaw Formation (sand). Locally, the Selma Group consists of approximately 440 to 563 feet of lower permeability ( $1 \times 10^{-6}$  to  $1 \times 10^{-8}$  cm/sec), gray clay and chalk. The upper 10-20 feet near the ground surface at the Landfill site consists of brown clay, which represents the weathered portion of the upper formation. The thick chalk formations of the Selma Group serve as a confining layer for the underlying Eutaw sands. The Eutaw Formation consists of gray, glauconitic, fine to medium grained sand and represents the regional water supply aquifer. Thus, in addition to the Landfill's engineered subsurface liner, each of these naturally-occurring underlying geologic layers have a low permeability which reduces the opportunity for releases impacting the groundwater.<sup>51</sup>

During the course of this investigation, the EPA experts and ECRCO reviewed permitting and site suitability documents related to the Arrowhead Landfill. The site suitability documents show a 2001 investigation<sup>52</sup> to identify water supply wells located within one mile of the then-proposed Landfill site boundaries.<sup>53</sup> The investigation included a reconnaissance by a consultant geologist to identify wells; a review of Geological Society of America (GSA) publications; and interviews with a Perry County Commissioner, City of Uniontown officials, ADEM personnel, and local residents or neighbors. The 2001 investigation reviewed a document entitled, "*Uniontown Utilities Local Wellhead Protection Plan*," a second reconnaissance of water wells was performed by a consultant geologist in May 2005. The results of the investigation produced the following:

- Fourteen wells were identified within one mile of the Landfill site, and nineteen were identified in the township (*i.e.*, Uniontown).
- Eight of fourteen wells located within a mile of the site were reportedly either not in use or supplied water for agricultural purposes.
- A municipal drinking water system is supplied by three wells (as of 2001-2002) located in and east of Uniontown. The municipal system wells are located between two to three miles northwest of the existing disposal cells of the Landfill, and are hydraulically upgradient and/or hydraulically cross-gradient from the Landfill site. These wells

<sup>49</sup> 40 C.F.R. Part 258.40 and ADEM Admin. Code r. 335-13-1-.03 and 335-13-4-.18

<sup>50</sup> *Id.*

<sup>51</sup> Jordan, Jones & Goulding, Inc., Solid Waste Permit Application Volume 1/2 Site Analysis Perry County Associates Landfill Perry County, Alabama, March 2002, ADEM's Enforcement and Compliance Information eFile File Name 17668\_53\_03\_105\_20020319\_PERM\_SW\_Permit\_App\_Vol\_1.pdf.

<sup>52</sup> *Id.*

<sup>53</sup> Jordan, Jones & Goulding, Inc., Solid Waste Permit Application Volume 1/2 Landfill Design & Operations Plan For Perry County Associates Landfill, September 2005, ADEM's Enforcement and Compliance Information eFile File Name XXX\_53-03\_105\_20050928\_PERM\_Permit\_Application.pdf

- produce groundwater from the Eutaw Formation aquifer and reportedly range in depth from 915 to 1,300 feet.
- Water from the municipal system is used by the Uniontown Utilities District, which supplies water to southern Perry County. The supply system serves the residents and businesses in Uniontown, plus rural residents within about five miles of town.
  - Of the fourteen wells identified within one mile of the Landfill site, local residents or neighbors verified that at least four (4) wells located south and southeast of the then-proposed Landfill site (*i.e.*, along CR-1–Cahaba Road and CR-21) were in use (in 2001-2002). The type(s) of usage of the groundwater from these wells (e.g., agriculture, potable, other) was not identified. The status of two (2) other wells in that specific vicinity was unknown. The investigation confirmed that three (3) other wells in that specific vicinity were no longer in use. Water wells in that specific vicinity (*i.e.*, along CR-1–Cahaba Road and CR-21) for which well information was available were confirmed to be deep wells drilled into the Eutaw Formation regional aquifer.
  - According to the Perry County Commissioners Office (in 2001-2002), all of the residents along CR-1 where these wells have been identified received drinking water from the Uniontown Utilities system.
  - According to Uniontown officials (in 2001-2002), drinking water was being supplied to all residents near the then-proposed Landfill site from the three wells in town (*i.e.*, via Uniontown Utilities).

Based on their review, the EPA experts concluded that there were no significant potential threat(s) to groundwater resources from the then-proposed landfill project. Furthermore, the Landfill site is situated on a thick, dry, relatively impermeable confining layer (Selma Group chinks) that serves as a substantial natural barrier between the landfill's waste units and the underlying regional Eutaw Formation sand aquifer, and no surficial aquifer or saturated zones were identified that could be affected by the landfill project, or which were interconnected to the uppermost aquifer.

In addition, the EPA experts reviewed EPA's GeoPlatform resource which is used for mapping, analysis, and collaboration of various sources of data. That review revealed no public utility drinking water intakes from surface water for at least 50 miles from the Landfill.

The EPA experts reviewed reports generated by Arrowhead Landfill's consultants and submitted to ADEM. Those reports showed occurrences of barium, acetone, and 2-hexanone. In multiple semi-annual detection monitoring events, groundwater analysis from the Landfill detected occurrences of barium, acetone, and 2-hexanone. Similarly, each of these constituents have been detected in the background groundwater monitoring wells with barium being detected in the groundwater prior to waste placement in the disposal unit. However, the Landfill's consultants, HHNT and Bunnell-Lammons Engineering, Inc., and ADEM have concluded that barium is naturally occurring in the soil and groundwater throughout Alabama.<sup>54</sup> Furthermore, the consultants have determined that the source of the volatile organic compounds (VOCs) (e.g.,

<sup>54</sup> Memorandum from Wesley S. Edwards, ADEM Groundwater Branch to Phillip D. Davis, ADEM Solid Waste Branch, February 21, 2012, ADEM's Enforcement and Compliance Information eFile File Name 17668\_53-03\_105\_20120221\_SWMR\_GW\_Review.pdf and ADEM's Enforcement and Compliance Information eFile File Name 17668\_53-03\_105\_20121002\_MONI\_GW\_Alternative\_Source\_Determination.pdf.

acetone, and 2-hexanone) is attributed to the well construction materials (e.g., black paint of the steel risers). Ultimately, none of the detections exceeded maximum concentration levels (MCL).<sup>55</sup>

ECRCO notes that, in accordance with the prescribed regulations, Arrowhead Landfill performed annual statistical analyses of the groundwater to determine whether a release of leachate had occurred.<sup>56</sup> The statistical analyses do not show evidence of a statistically significant increase over background groundwater quality or a release of leachate from the Arrowhead Landfill, and accordingly no impact to groundwater. Furthermore, ECRCO reviewed materials showing that no National Pollutant Discharge Elimination System (NPDES) permitted discharges from the Landfill were above the MCL.

Therefore, ECRCO was not able to establish a causal connection between the adverse harms alleged and permitting actions underlying the May 2013 issues and the operations of the Arrowhead Landfill. While compliance with environmental laws does not necessarily constitute compliance with federal civil rights laws, EPA recognizes a number of forms and types of evidence that could establish causation, including scientific proof of a direct link, prediction of potentially significant exposures and risks resulting from stressors created by the permitted activities or other sources, and other complex methodologies.<sup>57</sup> In this case, ECRCO also considered the complaint, supplemental information, information from a site visit, interviews, a review of ADEM's regulations and administrative codes, permitting documents, inspection reports, studies, and water sample reports. Here, the site-specific information did not establish that any of the alleged harms were caused by the permitting actions. Because causation was not established, and therefore no prima facie case of discrimination, ECRCO did not examine disparity or adversity.

<sup>55</sup> ADEM's Enforcement and Compliance Information efile File Names 17668\_53-03\_105\_20110413\_MONI\_GW\_rpt.pdf, 17668\_53-03\_105\_20110414\_MONI\_GW\_Rpt.pdf, 17668\_53-03\_105\_20110815\_SWMR\_GW\_Review.pdf, 17668\_53-03\_105\_20111024\_MONI\_GW\_Rpt.pdf, 17668\_53-03\_105\_20120427\_MONI\_GW\_Rpt.pdf (only barium detected), 17668\_53-03\_105\_20121031\_MONI\_GW\_Rpt.pdf, and 17668\_53-03\_105\_20130110\_MONI\_GW\_Revised\_Rpt-Fall\_2012.pdf.

<sup>56</sup> Each of the analyses were completed in accordance with EPA's Statistical Analysis of Groundwater Monitoring Data as RCRA Facilities-Unified Guidance (March 2009) and ADEM's solid waste management rule 335-13-4.27(2)(m). If the owner or operator determines, pursuant to 40 C.F.R. §258.53(g) documents that there is a statistically significant increase (SSI) over background for one or more of the constituents listed in appendix 1, the owner or operator: (1) Must, within 14 days of this finding, place a notice in the operating record indicating which constituents have shown statistically significant changes from background levels, and notify the State director that this notice was placed in the operating record; and (2) Must establish an assessment monitoring program meeting the requirements of 40 C.F.R.258.55 within 90 days except as provided for in paragraph (c)(3) of this section, and (3) The owner/operator may demonstrate that a source other than a MSWLF unit caused the contamination or that the SSI resulted from error in sampling, analysis, statistical evaluation, or natural variation in ground-water quality. If a successful demonstration is made and documented, the owner or operator may continue detection monitoring as specified in this section. If, after 90 days, a successful demonstration is not made, the owner or operator must initiate an assessment monitoring program as required in 40 C.F.R. 258.55.

<sup>57</sup> U.S. Department of Justice Title VI Legal Manual, Section VII (Proving Discrimination – Disparate Impact), at (C)(1)(d), at <https://www.justice.gov/crt/fcs/T6Manual17>.



- Coal Ash

ECRCO did not accept for investigation, as part of the May 2013 issues, an issue regarding coal ash. However, during subsequent conversations with Complainants, Complainants provided more details about current coal ash concerns and its possible adverse health impacts on the community given that Arrowhead Landfill is permitted to accept and maintain coal ash. Some of the described health impacts include respiratory problems, including coughing, severe stomach problems, and concerns regarding water quality in the area surrounding the Arrowhead Landfill.<sup>58</sup> These concerns related to both air and water.

Regarding these concerns, ECRCO found that on July 27, 2011, the ash disposal area of the Arrowhead Landfill was closed utilizing a Resource Conservation and Recovery Act (RCRA) Subtitle D final closure system to encapsulate the waste.<sup>59</sup> The final closure system consisted of a synthetic liner and a layer of soil capable of sustaining a vegetative cover to control erosion. ADEM certified the partial closure of the ash disposal area on October 11, 2011. The final closure system is designed to minimize the infiltration of surface water from entering the disposal cell and minimize erosion. For example, to date the groundwater monitoring system has not detected a release from this disposal unit, the final closure system is stabilized, and there is no evidence of liner failure.

There is insufficient evidence that in its encapsulated state the coal ash is causing any alleged environmental and health effects. Therefore, ECRCO was not able to establish a causal connection between the adverse harms alleged and permitting actions underlying the May 2013 issues and the operations of the Arrowhead Landfill. Because there is no causal connection, and therefore no prima facie case of discrimination, ECRCO did not examine disparity or adverse harm.

- Vectors

The Complainants alleged quality of life impacts due to the increased populations of flies and birds associated with the Arrowhead Landfill operations. ECRCO did not complete an on-site evaluation of the Arrowhead Landfill's operations or conduct interviews of the Landfill manager or certified operators as part of this complaint investigation. However, ECRCO reviewed available records, including the Landfill's operating plans,<sup>60</sup> permit requirements, such as cover requirements and special waste approvals, ADEM inspection records, and the Landfill's leachate

<sup>58</sup> Letter from Marianne Engelman Lado, Senior Staff Attorney, Earthjustice and Matthew R. Baca, Associate Attorney, Earthjustice Northwest Office to Velveta Golightly-Howell, Director, Office of Civil Rights and Jeryl Covington, Acting Assistant Director, Office of Civil Rights, U.S. Environmental Protection Agency, page 13. (March 8, 2016). Complainants also discussed this issue during telephone interview conducted in 2016 and 2017.

<sup>59</sup> 40 C.F.R. 258 Subpart F and ADEM Admin. Code r. 335-13-4-.20(2)(b).

<sup>60</sup> Permit Renewal Application for Arrowhead Landfill Permit #53-03 for Perry County Associates, LLC Perry County, Alabama Revised April 2011, Volume 1 of 2, ADEM File Name: 17668\_53-03\_105\_20101229\_PERM\_Permit\_Renewal\_Vol\_10f2.pdf; and, Permit Renewal Application for Arrowhead Landfill Permit #53-03 for Perry County Associates, LLC Perry County, Alabama December 2010, Volume 2 of 2, ADEM File Name: 17668\_53-03\_105\_20101229\_PERM\_Permit\_Application\_for\_Permit\_Renewal\_Vol\_20f2.pdf.



management procedures<sup>61</sup> in an attempt to identify possible operational irregularities or violations that may result in the alleged quality of life harms.

At the time of ECRCO's review, the permitting documents did not show any occurrences of active leachate breakouts which could generate or attract an increase in the vector population; nor did the permitting documents produce evidence of distressed vegetation being identified along the sideslopes of the Landfill during routine inspections. The records did show that the Landfill's former leachate generation rate was 50,000 to 100,000 gallons per day, which also included management of an influx of storm water into the collection system.<sup>62</sup> The Landfill employed techniques to reduce the leachate generation rate by 35,000 gallons per day through operational changes that included segregating storm water via the utilization of rain covers, by continuing solidification, and recirculating leachate by direct discharge into the working face or through injection wells within the cells.<sup>63</sup> Reports showed that the remaining generated leachate was transported by tanker truck to publicly-owned treatment works for treatment and disposal.<sup>64</sup> Furthermore, and as previously stated above, the Arrowhead Landfill operates 25 solar powered gas vent flares for the landfill leachate collection system cleanout vents to mitigate odors that could attract vectors. ECRCO was unable to identify any functions related to leachate management that could result in the reported increased populations of flies and birds.

The Arrowhead Landfill's waste acceptance provisions include nonhazardous solid wastes, noninfectious putrescible and nonputrescible waste, and special waste including asbestos, foundry sand, petroleum contaminated waste, and municipal solid waste ash.<sup>65</sup> As an operational requirement, the Landfill confines and compacts the waste within the smallest working face of the disposal unit having a vertical thickness of less than eight (8) feet.<sup>66</sup> During periods of transition between former and newly constructed cells and for the management of construction and demolition materials, the Landfill received permitting variances from ADEM for the operation of two (2) working faces. ECRCO was unable to identify any functions related to the waste acceptance provisions or the waste placement requirements that could result in the alleged increased populations of flies and birds.

At the conclusion of each day's operations, the Arrowhead Landfill is required to cover the daily operating area with a minimum of six (6) inches of compacted earth or other alternative daily cover (ADC) materials.<sup>67</sup> ADEM has approved the following alternative daily covers for the Arrowhead Landfill: synthetic tarps, coal combustion by-products from electrical generators, petroleum contaminated soils, automotive shredder residue, and Posi-Shell®. As permitted, some

<sup>61</sup> Hodges, Harbin, Newberry & Tribble, Inc. February 15, 2010 correspondence to ADEM, Perry County Associates Landfill, Leachate Handling Procedures, HHNT Project No. 6004-010-10, ADEM File Number 17688\_53-03\_105\_20100217\_CORR\_Leachate\_Hand\_Proc.pdf.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Arrowhead Permit Modification ADEM's Enforcement and Compliance Information eFile File Name 17688\_53-03\_105\_20121023\_PERM\_Permit.pdf (October 23, 2012); Arrowhead Landfill Permit Variance ADEM's Enforcement and Compliance Information eFile File Name: 17668\_53-03\_105\_20130617\_PERM\_Permit.pdf (June 17, 2013)

<sup>66</sup> *Id.*

<sup>67</sup> ADEM Admin. Code r. 335-13-4-.22(1)(a)1.

of the ADCs have storage and placement limitations to prevent contact storm water runoff from leaving the limits of the lined cell area. ECRCO was unable to identify any functions related to the daily cover requirements or the utilization of ADCs that could result in the alleged increased populations of flies and birds.

Therefore, ECRCO was not able to establish a causal connection between the adverse harms alleged and permitting actions underlying the May 2013 issues and the operations of the Arrowhead Landfill. While compliance with environmental laws does not necessarily constitute compliance with federal civil rights laws, EPA recognizes a number of forms and types of evidence that could establish causation, including scientific proof of a direct link, prediction of potentially significant exposures and risks resulting from stressors created by the permitted activities or other sources, and other complex methodologies.<sup>68</sup> In this case, ECRCO also considered the complaint, supplemental information, Landfill's operating plans, permit requirements, such as cover requirements and special waste approvals, ADEM inspection records, and the Landfill's leachate management procedures. Here, the site-specific information did not establish that any of the alleged harms were caused by the permitting actions. Because causation was not established, and therefore no prima facie case of discrimination, ECRCO did not examine disparity or adversity.

### **Non-Health Related Impacts**

- Degradation of Cemetery

During the course of the investigation, Complainants raised concerns regarding how ADEM's decision to permit Arrowhead Landfill has adversely affected the ability of the members of the Uniontown community to visit New Hope Church Cemetery. Specifically, Complainants stated that the proximity of the Landfill interferes with community members visiting the Cemetery due to acrid odor from the Landfill, the installation of water monitors on Cemetery grounds, failure to maintain access to the Cemetery premises and disturbing the Cemetery grounds with the use of heavy equipment. In addition, Complainants state that ADEM's permitting actions failed to ensure that the Cemetery was protected from the aforementioned instances of interference. ECRCO investigated this issue by visiting the Cemetery in August 2014 and by reviewing information submitted by Complainants, including pictures, documents submitted by ADEM and Green Groups Holdings, LLC.

ECRCO's review found that the owners of the Arrowhead Landfill owned the Cemetery property at the time Complainant's filed their Complaint and for some period prior. The Cemetery property, however, was never part of the ADEM-permitted Arrowhead Landfill and the Landfill maintained a minimum 100-foot buffer between the waste disposal unit and its property boundaries. In January 2016, the Arrowhead Landfill conducted an initial reconnaissance level site visit in which it was determined that clearing was needed of unwanted growth to accurately define the cemetery boundaries. During this visit funerary objects and historic, ornamental, or traditional landscape features and planting were identified as well as an older split cedar post and

<sup>68</sup> U.S. Department of Justice Title VI Legal Manual, Section VII (Proving Discrimination – Disparate Impact), at (C)(1)(d), at <https://www.justice.gov/crt/fcs/T6Manual7>.

a barbed wire fence. According to this report, all objects were marked and left in place where they were found. In February 2016, ADEM approved the Landfill's request to reduce its permitted Landfill property by ~3.12 acres that surrounded the Cemetery. The Landfill moved the 100-foot buffer boundary to maintain compliance with separation requirements and then deeded this ~3.12 acres parcel, along with the Cemetery property, to the New Hope Cemetery Foundation. Furthermore, this reduction in acreage required a minor permit modification to relocate required monitoring elements [e.g., four (4) methane monitoring points] located along the property boundary within the landfill's permitted footprint area, further away from the cemetery.

ECRCO was not able to establish a causal connection between the adverse harms alleged and ADEM's permitting actions underlying the May 2013 issues given that the Cemetery was never within the operational boundaries of the permitted Arrowhead Landfill property that ADEM permitted. Also, ADEM approved the Landfill's request to reduce the Landfill boundaries by ~3.12 acres surrounding the Cemetery. Thereafter, Arrowhead deeded this property and the Cemetery to the Cemetery Foundation. Because ECRCO is not able to establish a causal connection, ECRCO cannot determine a prima facie case of discrimination. ECRCO did not examine disparity or adverse harm.

Although not relevant to the Title VI analysis discussed above, ECRCO notes that information brought to our attention during this investigation suggests that there is conflicting information and apparent misunderstanding regarding the responsibility for upkeep and maintenance of the cemetery. Although these actions are not legally required, ECRCO believes that the Arrowhead community would benefit from ADEM's leadership in initiating conversation between ADEM, the Landfill, and members of the community to provide information and discuss the 2016 reduction of the permitted Landfill boundary and clarify the roles and responsibilities related to the overall management of the Cemetery and adjacent properties.

- Lack of Fence Around Landfill & Increased Roaming Wildlife

Complainants raised concerns that the Arrowhead Landfill does not have a physical fence that extends around the perimeter of the property, resulting in increased wildlife migration between the Landfill and the community. Complaints assert that a fence would reduce the number of animals entering and exiting the Landfill property. It is unclear what harm is actually being alleged as a result of the alleged "increased migration" between the landfill and the community. Based on the evidence presented, it is also unclear why Complainants believe this particular mitigation, a fence, would address the alleged migration of animals.

The Arrowhead Landfill encompasses approximately 980 acres and is permitted to utilize both a natural and an artificial (physical) barrier along its perimeter for the purpose of controlling public access and preventing unauthorized vehicular traffic and illegal dumping of wastes.<sup>69</sup> The

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<sup>69</sup> ADEM Admin. Code r.335-13-4-.19 Access. The owner or operator of the facility must control public access and prevent unauthorized vehicular traffic and illegal dumping of wastes by using artificial barriers, natural barriers, or both, as appropriate to protect human health and the environment.

Director LeFleur

Page 18

Landfill maintains a minimum 100-foot buffer between the waste disposal unit and its property boundaries.<sup>70</sup>

ECRCO has determined that there is insufficient evidence in the record to establish adverse harm resulting either from the alleged movement of animals or the absence of a fence around the Arrowhead Landfill.

- Diminution in Home Values

Complainants raised concerns related to diminution of property values due to ADEM's permitting actions underling the May 2013 issues. For its part, EPA has substantial discretion to determine the types of harms, on a case by case basis, that warrant investigatory resources and are sufficiently harmful to violate Title VI.<sup>71</sup> ECRCO determined that it would not investigate substantively the alleged harm of diminution of property values, in this case. There is insufficient evidence in the record to suggest that ADEM's permitting actions themselves resulted in a sufficiently significant harm with regard to property values.

## II. The 2016 Retaliation Issue

In 2016, ECRCO accepted the following additional issue for investigation:

Whether ADEM's actions or inactions, violated 40 C.F.R. § 7.100, which prohibits intimidating, threatening, coercing, or engaging in other discriminatory conduct against any individual or group because of actions taken and/or participation in an action to secure rights protected by the non-discrimination statutes OCR enforces.

With respect to this issue, ECRCO finds insufficient evidence of discrimination based on retaliation. However, as explained below, ECRCO has concerns about the transparency of ADEM's process for addressing and resolving retaliation complaints, as well as the underlying processes and environmental complaint determinations which form the basis for some of Complainant's claims of retaliation. Our investigation revealed that ADEM's failure to provide explanation and clarifying information to Complainants to support its retaliation and environmental complaint determinations leads to an atmosphere where complainants feel that ADEM is inattentive to their concerns about the Arrowhead Landfill and whether their complaints are handled by ADEM in an impartial manner.

<sup>70</sup> ADEM Admin. Code r.335-13-4-.12 (2)(f), ADEM's Enforcement and Compliance Information eFile File Names 17668\_53-03\_105\_20110412\_PERM\_Modificationin\_Application-Horizontal\_Expansion-Drawings.pdf, and 17668\_53-03\_105\_20160330\_PERM-Application\_Drawings.pdf

<sup>71</sup> See *Choate*, 469 U.S. at 293-94: "Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impact upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts." See also *Alexander v. Sandoval*, 532 U.S. 275, 305-6 (2001) (Stevens, J., dissenting).

## Background

On August 19, 2016, Complainants in EPA File No. 12R-13-R4 requested to supplement the existing complaint in that matter due to allegations that ADEM, directly and through the actions of Green Group Holdings, engaged in and failed to protect Complainants from a continuing practice<sup>72</sup> of retaliation and intimidation.<sup>73</sup> The Complainants provided additional clarifying information about alleged instances of retaliation in a follow up conference call on September 15, 2016. In addition, Complainants submitted information in letters dated December 14, 2016, and July 28, 2017, which included specific examples and claims of “a broader pattern of intimidation and irregularities in ADEM’s complaint process.”<sup>74</sup> ECRCO also conducted an interview with one of the Complainants on September 7, 2017.

## Legal Standard

The Title VI implementing regulation at 40 C.F.R. § 7.100, provides that “[n]o applicant, recipient, nor other person shall intimidate, threaten, coerce, or discriminate against any individual or group, either: (a) For the purpose of interfering with any right or privilege guaranteed by the Acts of this part, or (b) Because the individual has filed a complaint or has testified, assisted or participated in any way in an investigation, proceeding or hearing under this part or has opposed any practice made unlawful by this regulation.”<sup>75</sup>

To establish that retaliation has occurred, ECRCO first must determine whether: (1) An individual engaged in protected activity of which the recipient was aware; (2) the recipient took a significantly adverse action against the individual; and (3) a causal connection exists between the individual’s protected activity and the recipient’s adverse action.<sup>76</sup> If all of these elements are present, a *prima facie* case of retaliation has been established and ECRCO then inquires whether

<sup>72</sup> In evaluating the Complainant’s allegations, ECRCO determined that some of the discrete alleged acts described by the complainant fell outside of the 180-day regulatory filing requirement. (40 C.F.R. § 7.120) ECRCO analyzed these as part of an alleged continuing discriminatory practice. *See* Case Resolution Manual (Jan. 2017), at [https://www.epa.gov/sites/production/files/2017-01/documents/final\\_epa\\_ogc\\_ecrco\\_crm\\_january\\_11\\_2017.pdf](https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf). “The complainant must allege facts that are sufficient to indicate either a series of related, discrete acts of which one occurred within the 180-day filing period or a systemic policy or practice that operated within the 180-day period.”

<sup>73</sup> Letter from Marianne Engelman Lado, Senior Staff Attorney, Earthjustice to Lilian Dorka, Interim Director, Office of Civil Rights, U.S. Environmental Protection Agency. (August 19, 2016).

<sup>74</sup> Letter from Marianne Engelman Lado, Visiting Clinical Professor of Law, Environmental Justice Clinic, Yale Law School to Lilian Dorka, Director, External Civil Rights Compliance Office, Office of General Counsel, U.S. Environmental Protection Agency Headquarters, at p.7 (July 28, 2017). *See also* Letter from Marianne Engelman Lado, Senior Staff Attorney, Earthjustice to Lilian Dorka, Acting Director, Office of Civil Rights, U.S. EPA. (December 14, 2016).

<sup>75</sup> 40 C.F.R. § 7.100. Title VI gives authority for this investigation. *See* *Peters v. Jenney*, 327 F.3d 307, 316-18 (4th Cir. 2003) (concluding that under the Supreme Court’s decision in *Sullivan v. Little Hunting Park, Inc.* 396 US 229 (1969) (a prohibition on discrimination should be judicially construed to include an implicit prohibition on retaliation against those who oppose the prohibited discrimination) (internal citations omitted).

<sup>76</sup> U.S. Dept. of Justice Title VI Legal Manual, Section VIII (Proving Discrimination – Retaliation) (B)(3), at <https://www.justice.gov/crt/fcs/T6Manual8>; *see also* *Peters v. Jenney*, 327 F.3d 307, 320 (4th Cir. 2003) (internal citation omitted); *Emeldi v. Univ. of Oregon*, 673 F.3d 1218, 1223 (9th Cir. 2012) (applying Title VII framework to establish a *prima facie* case of retaliation under Title IX); *Palmer v. Penfield Cent. Sch. Dist.*, 918 F. Supp. 2d 192, 199 (W.D.N.Y. 2013); *Kimmel v. Gallaudet Univ.* 639 F. Supp. 2d 34, 43 (D.D.C. 2009); *Hickey v. Myers*, 852 F. Supp. 2d 257, 268 (N.D.N.Y. 2012); *Chandamuri v. Georgetown Univ.*, 274 F. Supp. 2d 71, 84 (D.D.C. 2003).

the recipient had a legitimate, non-retaliatory reason for taking action that was adverse. ECRCO then analyzes the evidence to determine whether the offered reason is merely an excuse or pretext for retaliation.<sup>77</sup>

In addition, Title VI's prohibition on retaliation may extend to third parties,<sup>78</sup> which may include lower-level recipient employees, program beneficiaries or participants, organizations with a relationship to the recipient such as contractors, and others.<sup>79</sup> Recipients have two key obligations related to third party retaliation: first, to protect individuals from potential retaliation, recipients are obligated to keep the identity of Complainants confidential except to the extent necessary to carry out the purposes of the Title VI regulations, including conducting investigations, hearings, or judicial proceedings; and second, recipients must investigate and respond when a third party engages in retaliatory conduct that Title VI prohibits.<sup>80</sup> As with other types of third party conduct, such as harassment, the extent of the recipient's obligation is tied to the level of control it has over the bad actor and the environment in which the bad acts occurred.<sup>81</sup> EPA makes these determinations on a case-by-case basis in light of the facts and totality of circumstances in a particular case.

#### ***Allegation 1: ADEM's Response to Complainant's March 25, 2016 Letter***

Complainants alleged that ADEM failed to investigate allegations of intimidation and retaliation by ADEM's permittee, Green Group Holdings, which Complainants brought to ADEM's attention through correspondence dated March 25, 2016.<sup>82</sup> Specifically, Complainants asserted that Green Group Holdings threatened to take legal action against "community members" speaking out about the threats and injuries endured and perceived in the town,"<sup>83</sup> including statements about alleged desecration of New Hope Church Cemetery and alleged unpermitted discharge leaving Arrowhead Landfill.<sup>84</sup>

<sup>77</sup> See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 186-86 (noting the framework for proof developed in civil rights cases), citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); see also, *Bowers v. Bd. of Regents of the Univ. Sys. of Ga.*, 509 Fed. Appx. 906, 912 (11th Cir. 2013)(finding that in a retaliation claim under Titles VI and IX, an adverse action is one that would dissuade a reasonable person from making or supporting a claim of discrimination)(citing, *Burlington Northern & Santa Fe Ry. v. White*, 126 S.Ct. 2405, 2415 (2006)).

<sup>78</sup> See 40 C.F.R. § 7.100 (stating that "[n]o applicant, recipient, nor other person shall intimidate, threaten, coerce, or discriminate against any individual or group. . .") (emphasis added). See also, 28 C.F.R. § 42.107(e) (Department of Justice regulations); 34 C.F.R. § 100.7(e) (Department of Education regulations); U.S. Dept. of Justice Title VI Legal Manual, Section VIII (Proving Discrimination – Retaliation) § (B)(3), at <https://www.justice.gov/crt/fcs/T6Manual8>

<sup>79</sup> U.S. Department of Justice Title VI Legal Manual, Section VIII: Proving Discrimination- Retaliation § (B)(3), at <https://www.justice.gov/crt/fcs/T6Manual8>.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*, citing *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 644 (1999).

<sup>82</sup> Letter from Matthew R. Baca, Associate Attorney, Earthjustice Northwest Office and Marianne Engelman Lado, Senior Staff Attorney, Earthjustice to Lance LeFleur, Director, Alabama Department of Environmental Management. (March 25, 2016).

<sup>83</sup> *Id.*

<sup>84</sup> Letter from Marianne Engelman Lado, Senior Staff Attorney, Earthjustice to Lilian Dorka, Interim Director, Office of Civil Rights, U.S. Environmental Protection Agency, at Exh. 6 (August 19, 2016).

Director LeFleur

Page 21

In addition, Complainants alleged that Landfill staff followed and observed community members and scientists near the Landfill in a way that Complainants perceived as threatening.<sup>85</sup> Also, Complainants allege that the Landfill disrupted the grounds at the New Hope Church Cemetery “by using a bulldozer to uproot trees, push up mounds of dirt, and widen a one-lane path into a 30 to 40-foot roadway through the cemetery grounds, possibly covering up some of the graves in the process.”<sup>86</sup>

ADEM responded to the March 26, 2016 complaint about alleged retaliatory conduct by its permittee, Green Group Holdings, in a letter to Earthjustice on April 8, 2016.<sup>87</sup> ADEM stated that it reviewed the information and determined not to become involved in the dispute between Complainants and Green Group Holdings. ADEM explained that its permittee remained in compliance with the conditions set forth in the permit and further stated that New Hope Church Cemetery property is outside the boundaries of the Landfill. Therefore, according to ADEM, any activities occurring at the Cemetery are outside the purview of the permit and further constitute a private dispute about libel and slander, which has nothing to do with Complainant’s Title VI complaint. As a result, ADEM concluded that it would not get involved in the matters brought forth by the Complainants.

As to Allegation 1, ECRCO has determined that the Complainants engaged in a protected activity when they filed a Title VI administrative complaint with EPA alleging discrimination on the basis of race in a letter dated May 20, 2013.<sup>88</sup> These activities are rights and privileges guaranteed by Title VI and EPA’s implementing regulation that are protected from retaliation.<sup>89</sup>

Although it appears that ADEM may not have handled the complaint through its nondiscrimination grievance procedures, ECRCO has found insufficient evidence to clearly establish a causal connection between the alleged adverse action (failure to investigate) and the protected activity of filing a Title VI complaint. In particular, there is no evidence that ADEM’s apparent failure to address the Complainant’s retaliation complaint through its nondiscrimination grievance procedures in March 2016 was motivated by Complainant’s Title VI complaint filing in June 2013,<sup>90</sup> other than the assertion by the Complainants that it was so.<sup>91</sup> As a result, there is

<sup>85</sup> Letter from Matthew R. Baca, Associate Attorney, Earthjustice Northwest Office and Marianne Engelman Lado, Senior Staff Attorney, Earthjustice to Lance LeFleur, Director, Alabama Department of Environmental Management. (March 25, 2016).

<sup>86</sup> *Id.*

<sup>87</sup> Letter from Lance R. LeFleur, Director, ADEM to Matthew R. Boca, Esq. and Marianne Engelman Lado, Esq., Earthjustice. (April 8, 2016).

<sup>88</sup> Letter from David A. Ludder to Vicki A. Simons, Director, Office of Civil Rights, U.S. Environmental Protection Agency Re: Title VI Civil Rights Complaint and Petition for Relief or Sanction – Alabama Department of Environmental Management Permitting of Arrowhead Landfill in Perry County, Alabama (EPA OCR File No. 01R-12-R4). (May 30, 2013).

<sup>89</sup> See, e.g., *Peters v. Jenney*, 327 F.3d at 320-21 (applying the same meaning to “protected activity” in the Title VI context as in other civil rights cases, which is opposition to an unlawful practice that complainant has reason to believe has occurred), citing *Bigge v. Albertson’s, Inc.*, 894 F.2d 1497, 1503 (11<sup>th</sup> Cir. 1990).

<sup>90</sup> See, e.g., *Jones v. Gulf Coast Health Care of Del., LLC*, 854 F.3d 1261, 1271 (11<sup>th</sup> Cir. 2017) (noting that temporal proximity between a protected activity and an adverse action may be sufficient to establish a claim of retaliation, but if temporal proximity alone is relied on, it must be “very close” to establish causation)(internal citations omitted)

<sup>91</sup> See U.S. Department of Justice Title VI Legal Manual, Section VIII: Proving Discrimination- Retaliation § (B)(2).



Director LeFleur

Page 22

no causal connection between the protected activity and the adverse action to support a prima facie showing of retaliation.

Notwithstanding ECRCO's conclusion of insufficient evidence of a violation, ECRCO has concerns about ADEM's lack of transparency regarding the process it utilized to address this retaliation complaint. In analyzing this issue, ECRCO specifically asked ADEM whether it has a process/procedures for addressing and responding to claims of retaliation, intimidation, harassment or other misconduct by permitted facilities against community members. ADEM responded by referring generally to its Nondiscrimination Statement and provided a copy of its Environmental Complaint Process (SOP #9303).<sup>92</sup> This SOP documents the process for filing environmental complaints with ADEM, but does not address the process for filing and investigating claims of discrimination, including those involving retaliation and intimidation.

The complaint at issue here, involving allegations of retaliation and intimidation by Green Group Holdings, is one of intentional discrimination<sup>93</sup> which is the type of complaint that should be handled through a recipient's nondiscrimination grievance procedures.<sup>94</sup> The nondiscrimination regulation requires that recipients adopt grievance procedures that assure the prompt and fair resolution of nondiscrimination complaints.<sup>95</sup> Although there is insufficient evidence in the record to conclude that ADEM did not conduct an appropriate review of this alleged retaliation action, ADEM's use of its grievance procedures, rather than its apparent use of its Environmental Complaint Process, would have provided Complainants with greater clarity and transparency and would have provided ADEM an opportunity to address this issue at the state level.

Given that it appears ADEM handled this particular complaint outside of its nondiscrimination grievance procedures, ECRCO has concerns regarding whether ADEM will utilize its grievance procedures to process retaliation complaints going forward. As a result, although not legally required under these specific facts, ECRCO strongly recommends that ADEM clarify and explain in the grievance procedures themselves that ADEM will investigate and resolve retaliation and intimidation claims in a prompt and impartial manner under the grievance procedures, just as ADEM states it would do so with any other discrimination claim.<sup>96</sup> Although not legally required, ECRCO further recommends that ADEM's grievance procedures inform the public that during the investigation of all claims, including retaliation, the "preponderance of the evidence" standard will be applied.

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at <https://www.justice.gov/crt/fcs/T6Manual8> (there must be evidence of discriminatory intent that does not require support from inferences).

<sup>92</sup> Email from Tom Johnston, General Counsel, ADEM to Lilian Dorka, Director, External Civil Rights Compliance Office, EPA. (September 22, 2017) (attaching Environmental Complaint Process SOP #9303 Rev. 0, Version Date December 6, 2011).

<sup>93</sup> See, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005) (finding that "[r]etaliation is, by definition, an intentional act and a form of discrimination because the complainant is being treated differently).

<sup>94</sup> See <http://adem.alabama.gov/inside/files/CivilRightsProcess.pdf>. ADEM stated that its grievance procedures have not changed in any substantial way since 2004. See Letter from Lance R. LaFleur, Director, ADEM to Lilian Dorka, Acting Director, Office of Civil Rights, EPA (September 1, 2016), at Attachment 2 - Response to Questions.

<sup>95</sup> 40 C.F.R. § 7.90 (each recipient with 15 or more employees shall adopt grievance procedures that assure the prompt and fair resolution of complaints).

<sup>96</sup> See 40 C.F.R. § 7.100 (stating that "[n]o applicant, recipient, **nor other person** shall intimidate, threaten, coerce, or discriminate against any individual or group. . .") (emphasis added).



### ***Allegation 2: Environmental Management Commission Meeting***

Complainants alleged that some of them attended the Alabama Environmental Management Commission (EMC)<sup>97</sup> meeting held on August 16, 2013, to present to issues that were occurring in Uniontown related to Arrowhead Landfill and the wastewater treatment plant. Complainants further alleged that they were denied the opportunity to speak by EMC's board members due to the pending Title VI complaint.<sup>98</sup> For its part, ADEM denied that it or the EMC engaged in retaliatory conduct at the EMC meeting.

Regarding Allegation 2, ECRCO determined that the Complainants engaged in a protected activity when they filed a Title VI administrative complaint with EPA alleging discrimination on the basis of race.<sup>99</sup> ECRCO also found that the EMC took an adverse action against the Complainant(s) by denying them the opportunity to present during the August 2013 meeting. Complainants presented evidence that initially they would be allowed to speak at the EMC meeting, including providing a meeting agenda which made reference to their request to speak.<sup>100</sup> However, EMC ultimately precluded them from speaking due to their part in an active Title VI complaint dealing with the Arrowhead Landfill.<sup>101</sup> Complainants' participation in an active Title VI complaint and their preclusion from speaking for that reason provides the causal connection between the protected activity and the adverse action. Thus, ECRCO determined that the evidence supports the establishment of a prima facie case of retaliation.

Once a prima facie case has been established, the recipient must show that there was a legitimate non-discriminatory/retaliatory reason for the adverse action and that it was not a pretext for discrimination. As part of its investigation of this issue, ECRCO reviewed the EMC's August 16, 2013 hearing minutes, and requested further information from ADEM regarding the justification for the EMC's decision to preclude Complainants from speaking at the meeting. On August 9, 2017, ADEM provided its response. In doing so, ADEM referred to its rule which restricts public comments related to pending matters that are being addressed in another forum

<sup>97</sup> The EMC is the oversight body for ADEM and serves in a quasi-judicial role in hearing appeals of administrative actions of ADEM (Ala. Code §§ 22-22A-6 and 7; ADEM Admin. Code r. 335-1-1-.03 and ADEM Admin. Code chap. 335-2-1). Email from Tom Johnston, General Counsel, ADEM to Lilian Dorka, Director, External Civil Rights Compliance Office. (August 9, 2017). ADEM's website adds that [t]he EMC is composed of seven members who are appointed to six-year terms by the governor and subject to confirmation by the Alabama Senate. EMC is charged with developing the state's environmental policy, hearing administrative appeals of permits, administrative orders and variances issued by the Department, adopting environmental regulations and selecting an ADEM director. See <http://www.adem.state.al.us/commission/default.cnt>.

<sup>98</sup> Conference call discussion between EPA representatives and Complainants on September 15, 2016.

<sup>99</sup> Letter from David A. Ludder to Vicki A. Simons, Director, Office of Civil Rights, U.S. Environmental Protection Agency Re: Title VI Civil Rights Complaint and Petition for Relief or Sanction — Alabama Department of Environmental Management Permitting of Arrowhead Landfill in Perry County, Alabama (EPA OCR File No. 01R-12-R4). (May 30, 2013).

<sup>100</sup> EMC Meeting Agenda (August 17, 2012), at <http://www.adem.state.al.us/commission/minutes/8-16-13EMCMeetingFinalMinutes10-18-13.pdf>.

<sup>101</sup> EMC Meeting Final Minutes, pp. 28-30 (August 13, 2013). <http://www.adem.state.al.us/commission/minutes/8-16-13EMCMeetingFinalMinutes10-18-13.pdf>.

for investigation and determination. Specifically, ADEM Admin. Code Rule 335-2-3-.05(3)<sup>102</sup> states:

After consideration of agenda items the Commission may consider comments from the members of the public. While the Commission encourages public participation at its meetings, for reasons of fairness and due process to the parties in administrative and legal proceedings involving the Commission, it specifically discourages the members of the Commission from engaging in the non-deliberative discussion of any case or legal proceeding pending before the Commission, or of any decision by the Commission or matter involving the Commission or Department that is subject of any ongoing case or legal proceeding. Parties to such proceedings and members of the general public shall not be permitted to use the public participation opportunities herein provided by the Commission to circumvent administrative or judicial procedures which specify the time and manner of presenting testimony, evidence, or comment to the Commission in a formal manner designed to provide due process to all parties.

Thus, according to ADEM, Complainants were not permitted to speak at the meeting because to do so would allow discussion relating to an ongoing case involving ADEM, and was not done so in retaliation for them filing a Title VI complaint. To support its position, ADEM provided additional examples where others who had pending proceedings unrelated to Title VI were likewise denied an opportunity to present for similar reasons pursuant to the same Rule.<sup>103</sup>

ECRCO has reviewed the evidence regarding Allegation 2 and determined that the EMC's decision to preclude Complainants from presenting at the August 16, 2013 EMC meeting was for a legitimate, non-retaliatory reason. In addition, ECRCO has determined that the information presented by ADEM shows that this same policy was applied in other circumstances during EMC meetings. That is, there is evidence to support that during other EMC meetings, prospective speakers were denied the opportunity to speak about other matters that were the

<sup>102</sup> ADEM Admin. Code Rule 335-2-3-.05(3) found at

<http://www.alabamaadministrativecode.state.al.us/JCARR/JCARR-APR-16/ADEM%20335-2-3-.05.pdf>

<sup>103</sup> Email from Tom Johnston, General Counsel, ADEM to Lilian Dorka, Director, External Civil Rights Compliance Office. (August 9, 2017). The email included an attached document identified as Exhibit A (archived minutes of EMC Meeting on 10/16/2009), Transcript Page Nos. 67-69. Additionally, the response included the following links to transcripts to show similar instances in which individuals who were not involved in Title VI matters were not allowed the opportunity to speak in front of the EMC due to pending matters that were currently being handled under a separate forum. Please find specific examples at the following web addresses:

<http://www.adem.alabama.gov/commission/minutes/4-19-13EMCMeetingFinalMinutes6-21-13.pdf>, Transcript at pp. 94-95;

<http://www.adem.alabama.gov/commission/minutes/8-16-13EMCMeetingFinalMinutes10-18-13.pdf>, Transcript at pp. 27-30;

<http://www.adem.alabama.gov/commission/minutes/10-18-13EMCMeetingFinalMinutes12-13-13.pdf>, Transcript at pp. 37-38;

<http://www.adem.alabama.gov/commission/minutes/6-20-14EMCMeetingFinalMinutes8-15-14.pdf>, Transcript at pp. 42-45;

<http://www.adem.alabama.gov/commission/minutes/10-21-16EMCMeetingFinalMinutes12-27-16.pdf>, Transcript at pp. 52-71;

<http://www.adem.alabama.gov/commission/minutes/2-20-15RulemakingCommitteeMeetingFinalMinutes4-17-15.pdf>, Transcript at pp. 133-147

subject of other pending administrative and legal proceedings, and also not Title VI matters. Thus, there is sufficient evidence to support ADEM's claim that the Policy is applied evenly in situations involving pending administrative and legal proceedings, regardless of the subject matter and thus, not a pretext for discrimination against the Complainants on the basis of engaging in the protected activity. Accordingly, ECRCO has determined that there is insufficient evidence to support a claim of retaliation against ADEM on this issue.

### ***Allegation 3: Insufficient Attention to Environmental Concerns Raised by Complainants***

The Complainants have alleged that ADEM has engaged in retaliation based on several incidents relating to ADEM's processing of environmental complaints from Complainants. For example, one of the Complainants stated that he visited ADEM offices in August 2016 for a public meeting. After the meeting, the Complainant approached an ADEM staff member and attempted to file an in-person complaint regarding runoff from the Arrowhead Landfill. According to this Complainant, the ADEM representative stated that ADEM would file the complaint for him and follow up. The Complainant asserted that the ADEM staff member never followed up nor provided a complaint number.

In investigating this issue, ECRCO reached out to ADEM to ask about its environmental complaint intake process and whether it has a separate or different intake process for complaints filed in person at ADEM offices. In response, ADEM referred ECRCO to its internal document Environmental Complaint Process (SOP #9303).<sup>104</sup> Based on the SOP's *Environmental Complaint Process* flow chart, in-person complaints to ADEM should be assigned to a staff member for entry into a complaint database for investigation. Subsequently, the assigned staff member is to communicate with the complainant to provide a complaint number and obtain additional information, as needed.<sup>105</sup> ECRCO checked ADEM's e-File system and was unable to locate a complaint from the Complainant around the referenced date, but did find record of several other complaints submitted by the Complainant from 2015 through 2017 concerning water runoff from the Landfill.<sup>106</sup>

In this instance, ECRCO determined that the Complainant engaged in a protected activity related to the filing of a Title VI administrative complaint with EPA alleging discrimination on the basis of race.<sup>107</sup> ECRCO also found that ADEM took an adverse action against the Complainant by failing to intake his complaint or follow up with him about his complaint. However, there is insufficient evidence that ADEM failed to intake the complaint due to Complainant's filing of the Title VI complaint because there is evidence of several other instances in which the Complainant was able to submit a complaint in which ADEM provided a complaint number and

<sup>104</sup> Environmental Complaint Process SOP #9303 Rev. 0, Version Date December 6, 2011.

<sup>105</sup> Environmental Complaint Process SOP #9303 Rev. 0, Version Date December 6, 2011. (ADEM Environmental Complaint Process Diagram).

<sup>106</sup> Referencing Complaints found against Perry County Associates 2015-2017 EFILE – ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, at <http://app.adem.alabama.gov/eFile/>

<sup>107</sup> Letter from David A. Ludder to Vicki A. Simons, Director, Office of Civil Rights, U.S. Environmental Protection Agency Re: Title VI Civil Rights Complaint and Petition for Relief or Sanction – Alabama Department of Environmental Management Permitting of Arrowhead Landfill in Perry County, Alabama (EPA OCR File No. 01R-12-R4). (May 30, 2013).

Director LeFleur

Page 26

provided follow-up.<sup>108</sup> Thus, there is no causal connection between the protected activity and the adverse action to support a prima facie showing of retaliation.

The Complainant also asserted that ADEM has shown insufficient attention to Complainants who raise complaints about the Arrowhead Landfill. Specifically, Complainants cited to a November 13, 2015 incident where an ADEM employee responded to an environmental complaint submitted by two of the named Complainants by conducting an inspection of the Arrowhead Landfill.<sup>109</sup> According to Complainants, they witnessed ADEM employee and a Landfill representative concluding an inspection. At the time, Complainants stated that they were in the vicinity documenting continuing Landfill run-off. Complainants were able to get the attention of the ADEM employee to address their concerns about the runoff.<sup>110</sup> When the ADEM employee engaged Complainants, he did so in the presence of the Landfill representative. Complainants perceived this situation as intimidating. In addition, during the November 13 inspection the ADEM employee and the Landfill representative agreed to allow the Complainants to ride in the back seat of a vehicle on part of the facility grounds, but when one of the Complainants asked to visit specific areas of the Landfill related to their complaint, the ADEM employee ignored or dismissed their request.<sup>111</sup>

Here, ECRCO determined that the Complainants engaged in a protected activity related to the filing of a Title VI administrative complaint with EPA alleging discrimination on the basis of race.<sup>112</sup> ECRCO also found that ADEM took an adverse action against the Complainants by engaging with them in the presence of a Landfill representative while aware that Complainants had filed environmental complaints against the Landfill; however, there is insufficient evidence that ADEM handled this inspection in this manner due to Complainant's filing of the Title VI complaint. Specifically, there is no evidence beyond the assertion itself<sup>113</sup> to suggest that the filing of the Title VI complaint in June 2013 was the substantial or motivating reason for how this engagement with Complainants in November 2015 was conducted.<sup>114</sup> To this point, ECRCO asked ADEM to explain the circumstances under which the public participate in such

<sup>108</sup> See fn.95.

<sup>109</sup> Letter from Marianne Engelman-Lado, Visiting Clinical Professor of Law, Environmental Justice Clinic, Yale Law School to Lilian Dorka, Director, External Civil Rights Compliance Office, Office of General Counsel, U.S. Environmental Protection Agency Headquarters, at pp. 5-6 (July 28, 2017).

<sup>110</sup> Letter from Marianne Engelman-Lado, Visiting Clinical Professor of Law, Environmental Justice Clinic, Yale Law School to Lilian Dorka, Director, External Civil Rights Compliance Office, Office of General Counsel, U.S. Environmental Protection Agency Headquarters. (July 28, 2017).

<sup>111</sup> Letter from Marianne Engelman-Lado, Visiting Clinical Professor of Law, Environmental Justice Clinic, Yale Law School to Lilian Dorka, Director, External Civil Rights Compliance Office, Office of General Counsel, U.S. Environmental Protection Agency Headquarters. (July 28, 2017).

<sup>112</sup> Letter from David A. Ludder to Vicki A. Simons, Director, Office of Civil Rights, U.S. Environmental Protection Agency Re: Title VI Civil Rights Complaint and Petition for Relief or Sanction – Alabama Department of Environmental Management Permitting of Arrowhead Landfill in Perry County, Alabama (EPA OCR File No. 01R-12-R4). (May 30, 2013).

<sup>113</sup> See U.S. Department of Justice Title VI Legal Manual, Section VIII: Proving Discrimination- Retaliation § (B)(2), at <https://www.justice.gov/crt/fcs/T6Manual8> (there must be evidence of discriminatory intent that does not require support from inferences).

<sup>114</sup> See, e.g. *Jones v. Gulf Coast Health Care of Del., LLC*, 854 F.3d 1261, 1271 (11th Cir. 2017)(noting that temporal proximity between a protected activity and an adverse action may be sufficient to establish a claim of retaliation, but if temporal proximity alone is relied on, it must be "very close" to establish causation)(internal citations omitted)

environmental inspections; to which ADEM responded that “there are none.”<sup>115</sup> Furthermore, there is no indication that the Complainants requested to meet with the ADEM employee separately and that the ADEM employee's failure to send the Landfill representative away was based on Complainant's status as Title VI complainants. Thus, there is no causal connection between the protected activity and the adverse action to support a prima facie showing of retaliation.

As another example of ADEM's alleged inattention to their complaints, Complainants described an instance in which separate individuals filed an environmental complaint, but received the same complaint number. Complainants identified Complaint No. 7k-002wd5e88 as an example of where this occurred. On or about November 11, 2015, one of the Complainants called in an environmental complaint about run-off at the Arrowhead Landfill. This Complainant received Complaint No. 7k-002wd5e88 for his complaint. On or about November 12, 2015, another Complainant called to complain about run-off at the Arrowhead Landfill, and was give the same complaint number as the Complainant on the day before. Then, on November 13, 2015, still another Complainant complained to ADEM about Arrowhead Landfill run-off and was also give the same complaint number as the other two Complainants.<sup>116</sup>

ECRCO asked ADEM about its environmental complaint intake process and how it determines whether to give complaints the same complaint number. ECRCO also specifically asked if the logging of complaint No. 7k-002wd5e88 followed the complaint intake process. ADEM responded as follows: “If similar complaints are received close in time regarding the same subject matter, or if a complaint is submitted by multiple Complainants (i.e. multiple signatures on a complaint, multiple form letters submitted together), those complaints may be assigned the same number. Whether complaints are assigned the same or different complaint numbers, each individual complainant is provided a complaint number for purposes of follow-up and tracking.”<sup>117</sup>

In this instance, ECRCO determined that the Complainants engaged in a protected activity related to the filing of a Title VI administrative complaint with EPA alleging discrimination on the basis of race.<sup>118</sup> ECRCO found no adverse action in ADEM assigning similar complaints with the same complaint number. All of the complaints were filed in consecutive days relating to the same environmental issue. ADEM explained that even though the same complaint number may be given to multiple complaints filed close in time with similar subject matter, each individual complainant is given the number for purposes of tracking. Accordingly, by referring to the assigned number, Complainants are still afforded the opportunity to follow-up with ADEM

<sup>115</sup> Email from Tom Johnston, General Counsel, ADEM to Lilian Dorka, Director, External Civil Rights Compliance Office, EPA. (September 22, 2017).

<sup>116</sup> Letter from Marianne Engelman-Lado, Visiting Clinical Professor of Law, Environmental Justice Clinic, Yale Law School to Lilian Dorka, Director, External Civil Rights Compliance Office, Office of General Counsel, U.S. Environmental Protection Agency Headquarters, at pp. 5-6 (July 28, 2017).

<sup>117</sup> Email from Tom Johnston, General Counsel, ADEM to Lilian Dorka, Director, External Civil Rights Compliance Office, EPA. (September 22, 2017).

<sup>118</sup> Letter from David A. Ludder to Vicki A. Simons, Director, Office of Civil Rights, U.S. Environmental Protection Agency Re: Title VI Civil Rights Complaint and Petition for Relief or Sanction – Alabama Department of Environmental Management Permitting of Arrowhead Landfill in Perry County, Alabama (EPA OCR File No. 01R-12-R4). (May 30, 2013).

Director LeFleur

Page 28

to ascertain the progress of their complaints. As a result, there is no adverse action to support a prima facie showing of retaliation.

In another instance, a Complainant filed an odor complaint in March 2016. However, Complainants contend that the odor complaint was not properly investigated because ADEM referred to an inspection of the facility conducted six months prior to the date the complaint was filed.<sup>119</sup> ECRCO asked ADEM how it determines whether a complaint warrants an onsite inspection and how past routine inspections are utilized to investigate newly received complaints. ADEM responded and stated that a follow-up inspection was not conducted due to similarity in the complaints and because ADEM was having continuing dialogue with the facility about the complaints and proposed response actions.<sup>120</sup>

Here, ECRCO determined that the Complainants engaged in a protected activity related to the filing of a Title VI administrative complaint with EPA alleging discrimination on the basis of race.<sup>121</sup> ECRCO also found that ADEM took an adverse action against the Complainants by not specifically investigating this odor incident, but instead referring to a previous inspection six months earlier. However, based on ADEM's explanation that it was addressing the matter with the facility, and in the absence of other evidence suggesting there was another motive, there is insufficient evidence that ADEM referred to the prior inspection in resolving Complainant's odor complaint due to the Complainant's filing of the Title VI complaint. Thus, there is no causal connection between the protected activity and the adverse action to support a prima facie showing of retaliation.

## Conclusion

For the reasons set forth above, the record does not establish a prima facie case of discrimination, with respect to the alleged harms due to failure to meet one or more of the elements of a prima facie case of disparate impact discrimination as specifically discussed with respect to each of the May 2013 issues. Accordingly, ECRCO finds insufficient evidence to conclude that ADEM violated Title VI and EPA's nondiscrimination regulation in regarding ADEM's permitting actions as alleged. ECRCO also finds insufficient evidence of discrimination based on retaliation.

Thank you and your staff for your cooperation during this investigation. If you have any questions, please feel free to contact me at (202) 564-9649, by e-mail at [dorka.lilian@epa.gov](mailto:dorka.lilian@epa.gov), or

<sup>119</sup> Letter from Marianne Engelman-Lado, Visiting Clinical Professor of Law, Environmental Justice Clinic, Yale Law School to Lilian Dorka, Director, External Civil Rights Compliance Office, Office of General Counsel, U.S. Environmental Protection Agency Headquarters, at p. 8 (July 28, 2017) (referencing Complaint 1N-007RG7H01, EFILE – ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, at <http://app.adem.alabama.gov/eFile/>).

<sup>120</sup> Letter from Lance R. LeFleur, Director, ADEM to Lilian S. Dorka, Acting Director, Office of Civil Rights, U.S. Environmental Protection Agency. Re: EPA File No. 06R-03-R4; 12R-13-R4; 13R-16-R4 ADEM Response to EPA Follow-up Information Request. Attachment 1-02. (September 1, 2016).

<sup>121</sup> Letter from David A. Ludder to Vicki A. Simons, Director, Office of Civil Rights, U.S. Environmental Protection Agency Re: Title VI Civil Rights Complaint and Petition for Relief or Sanction – Alabama Department of Environmental Management Permitting of Arrowhead Landfill in Perry County, Alabama (EPA OCR File No. 01R-12-R4). (May 30, 2013).

Director LeFleur

Page 29

U.S. mail at U.S. EPA, Office of General Counsel, External Civil Rights Compliance Office  
(Mail Code 2310A), 1200 Pennsylvania Avenue, N.W., Washington, D.C., 20460.

Sincerely,

A handwritten signature in black ink, appearing to read "Lilian S. Dorka".

Lilian S. Dorka, Director  
External Civil Rights Compliance Office  
Office of General Counsel

cc: Elise Packard  
Associate General Counsel  
Civil Rights & Finance Law Office

Ken Lapierre  
Assistant Regional Administrator  
Deputy Civil Rights Official  
U.S. EPA Region 4

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE  
OFFICE OF GENERAL COUNSEL

March 1, 2018

**Return Receipt Requested**

Certified Mail #: 7015 3010 0001 1267 2804

**In Reply Refer to:**

EPA File No. 13R-16-R4

Lance LeFleur, Director  
Alabama Department of Environmental Management  
P.O. Box 301463  
Montgomery, AL 36130-1463

**Re: Closure of Administrative Complaint, EPA File No. 13R-16-R4**

Dear Director LeFleur:

This letter is to notify you that the U.S. Environmental Protection Agency's (EPA) External Civil Rights Compliance Office (ECRCO) is resolving and closing, as of the date of this letter, Administrative complaint 13R-16-R4, against the Alabama Department of Environmental Management (ADEM). The complaint generally alleged that ADEM violated Title VI of the Civil Rights Act of 1964, as amended, 42 United States Code §§ 2000d *et seq.* (Title VI) and the EPA's nondiscrimination regulation found at 40 Code of Federal Regulations (C.F.R.) Part 7. With respect to the specific issues addressed in this case, EPA ECRCO finds insufficient evidence to conclude that ADEM violated Title VI and EPA's nondiscrimination regulation.

On February 24, 2016 ECRCO accepted for investigation the following issues:

Whether ADEM discriminated against African-American residents in the surrounding community on the basis of race/color through the modification of the solid waste disposal permit number 35-06 and authorization to the City of Dothan to expand the City of Dothan Sanitary Landfill in violation of Title VI of the Civil Rights Act of 1964 and EPA's implementing regulation; and

Whether ADEM is complying with the procedural safeguard provision delineated in 40 C.F.R. Part 7 Subpart D, which requires recipients of EPA financial assistance to have specific policies and procedures in place to comply with their affirmative non-discrimination obligations.



Director LeFleur

On November 3, 2016, ECRCO notified<sup>1</sup> you that it had determined that the first issue of this complaint, set forth above, was moot in light of ADEM's rescission and revocation of the permit, and was being closed administratively effective the date of that letter, and ECRCO would take no further action on that issue. At that time, ECRCO notified you that it would continue to investigate the second issue regarding ADEM's affirmative non-discrimination program, under EPA File No. 13R-16-R4.

At the outset of the investigation, ECRCO conducted an assessment of ADEM's nondiscrimination program relative to the requirements of federal nondiscrimination laws and regulation. During the pendency of this investigation, ECRCO communicated with ADEM on several occasions about its program and the steps ADEM had taken to address certain deficiencies in the program that ECRCO had identified. Specifically, on August 4, 2016, ECRCO conferred with ADEM regarding ECRCO's assessment of ADEM's program, as of that date, including sharing with ADEM the deficiencies in the program that ECRCO had identified and providing ADEM with technical assistance in order to address those deficiencies. During the conversation, ECRCO also requested additional information from ADEM to address open questions relevant to the investigation, such as further clarifying information regarding ADEM's nondiscrimination program and requesting information pertaining to the Dothan Landfill permit revocation process.

In May 2017, ECRCO met with ADEM leadership and staff in Montgomery, Alabama during EPA Region IV's Annual Environmental Justice meeting hosted by ADEM. At that time, ECRCO provided ADEM with a status update of ECRCO's investigation of the open Title VI complaints involving ADEM, including this matter, and proposed voluntary informal resolution as a path forward for resolving those complaints.<sup>2</sup> On June 20, 2017, ECRCO followed up with ADEM via conference call regarding ADEM's willingness to informally resolve this complaint and to further discuss ECRCO's review of ADEM's nondiscrimination program, as of that date, and to identify for ADEM areas of concern it needed to address to ensure compliance with federal nondiscrimination laws and regulation. Those specific issues are explained in the following sections of this letter. At that time, ADEM stated its position that there were no deficiencies in its program and, therefore, it did not view resolving the open Title VI cases through informal resolution to be appropriate under those circumstances. Rather, ADEM indicated it preferred to receive a letter documenting ECRCO's findings.

In the succeeding months, EPA continued to engage ADEM in conversation in an effort to provide technical assistance and to confirm ADEM's commitment to addressing deficiencies and improving its nondiscrimination program. During this time, ADEM continued to engage with EPA and made changes to its nondiscrimination program. ECRCO has concluded its investigation and has determined that, as of the date of this letter, there is insufficient evidence of current noncompliance with Title VI and EPA's nondiscrimination regulation.<sup>3</sup>

<sup>1</sup> Letter from Lilian S. Dorka, Acting Director Office of Civil Rights, to Lance R. LeFleur, Director, Alabama Department of Environmental Management (November 3, 2016).

<sup>2</sup> See, EPA's *Case Resolution Manual* at 22. "After acceptance of a complaint, and at any point during the investigation, ECRCO or the recipient may seek to informally resolve complaints of discrimination. (p.22) [https://www.epa.gov/sites/production/files/2017-01/documents/final\\_epa\\_ogc\\_ecrco\\_crm\\_january\\_11\\_2017.pdf](https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf)

<sup>3</sup> ECRCO is aware that Complainant represents plaintiffs in a pending lawsuit challenging the validity of ADEM's procedures titled "Memorandum #108: Procedure for Title VI or Environmental Justice Filing of Discrimination Complaints" and "ADEM Civil Rights and Environmental Justice Complaint Reporting and Investigating Process." However, there has not been a finding affecting the validity of these procedures and so that lawsuit does

Director LeFleur

## ADEM's Nondiscrimination Program

ECRCO investigated whether ADEM is in compliance with the requirements of EPA's nondiscrimination regulation,<sup>4</sup> which sets forth the foundational elements of a recipient's nondiscrimination program. These include: continuing notice of nondiscrimination under 40 C.F.R. § 7.95; the adoption of grievance procedures that assure the prompt and fair resolution of complaints which allege a violation of EPA's nondiscrimination regulation under 40 C.F.R. § 7.90; and the designation of at least one person to coordinate its efforts to comply with its nondiscrimination obligations under 40 C.F.R. § 7.85(g).

ECRCO also reviewed the programs, policies, and guidance ADEM is implementing to ensure it provides meaningful access for persons with limited-English proficiency<sup>5</sup> and persons with disabilities<sup>6</sup> to all its programs and activities that receive federal financial assistance from EPA. In addition, ECRCO investigated whether ADEM has in place a public participation policy and process that ensure that the public participation portion of its environmental permitting program provides meaningful public involvement that is consistent with Title VI and the Title VI implementing regulation.<sup>7</sup>

ECRCO began discussions with ADEM regarding its nondiscrimination program beginning in August 2016. Throughout its investigation of this issue, ECRCO identified elements of ADEM's nondiscrimination program that were deficient in meeting the regulatory nondiscrimination

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not affect our finding in this complaint.

<sup>4</sup> 40 C.F.R. Part 7, Subpart D. *See also* Title VI of the Civil Rights Act of 1964.

<sup>5</sup> *See* Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000(d) (prohibiting discrimination on the basis of national origin,) *Lau v Nichols* 414 U.S. 563, 568-69 (1974) (finding that the government properly required language services to be provided under a recipient's Title VI obligations not to discriminate based on national origin.) On June 25, 2004, EPA issued Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons (LEP Recipient Guidance). The LEP Recipient Guidance clarifies recipient's existing legal obligations to provide meaningful access to limited English proficient persons in all programs and activities that receive federal financial assistance from EPA. The LEP Recipient Guidance also provides a description of the factors recipients should consider in fulfilling their responsibilities to persons with limited-English proficiency to ensure meaningful access to recipients' programs and activities and the criteria EPA uses to evaluate whether recipients are in compliance with Title VI and the Title VI implementing regulation. LEP Recipient Guidance, 69 FR 35602, 35606-35607 (June 25, 2004), at <https://www.federalregister.gov/documents/2004/06/25/04-14464/guidance-to-environmental-protection-agency-financial-assistance-recipients-regarding-title-vi>; 40 C.F.R. § 7.35(a) (prohibiting discrimination on the basis of national origin in the programs or activities of a recipient of EPA assistance).

<sup>6</sup> *See* 40 C.F.R. §§ 7.45 – 7.75; Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794(a). Section 504, and EPA's implementing regulation prohibit discrimination on the basis of disability in any programs or activities receiving federal financial assistance.

<sup>7</sup> On March 21, 2006, EPA published its Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Public Involvement Guidance) which was developed for recipients of EPA assistance implementing environmental permitting programs. It discusses various approaches, and suggests tools that recipients may use to enhance the public involvement aspects of their current permitting programs. It also addresses potential Title VI issues that could arise related to the public participation process. [https://www.epa.gov/sites/production/files/2013-09/documents/title6\\_public\\_involvement\\_guidance.3.13.13.pdf](https://www.epa.gov/sites/production/files/2013-09/documents/title6_public_involvement_guidance.3.13.13.pdf), at 14207. For example, the Guidance mentions that the interface between public involvement and Title VI often arises when communities of color believe that they've been discriminated against as a result of a decision made in the permitting process, but these same communities have not been adequately involved in the decision-making process. *Id.* at 14210.

Director LeFleur

program requirements in light of the Title VI implementing regulation. Based on ECRCO's latest review of ADEM's nondiscrimination program, including changes it has made to its website, ECRCO has determined that ADEM has met the regulatory requirements for compliance with the nondiscrimination program requirements of the Title VI implementing regulation. The specific requirements are discussed below.

- a. Notice of Nondiscrimination: ECRCO has determined that, currently, ADEM meets the regulatory requirements regarding its Notice of Nondiscrimination ("Notice"). EPA's nondiscrimination regulation requires initial and continuing notice that the recipient does not discriminate on the basis of race, color, national origin, age, or disability in a program or activity receiving EPA assistance or, in programs covered by Section 13 of the Education Amendments, on the basis of sex.<sup>8</sup> The Notice must be posted in a prominent place in the recipient's offices or facilities, and may also include recipient's internal publications.<sup>9</sup> Today, the most "prominent" location for posting notice of nondiscrimination with the greatest public access is likely to include at least a reference on the recipient's website home page. As of the time of acceptance of this complaint, that is, February 2016, ECRCO identified that ADEM's Notice was not located in a prominent place on its website but rather was placed on the "Inside ADEM" web page, which is not the ADEM website's homepage and would require a search of ADEM's website in order to locate, and thus, not located in a "prominent" place.

Based on ECRCO's review as of September 2017, ADEM's Notice is now made available on its website's homepage, via a link labeled "Nondiscrimination Statement" in the first paragraph on the main ADEM website page. In addition, ADEM posts its Notice in its offices and one of its internal publications "Guide for Citizen Participation".<sup>10</sup>

Notice of Nondiscrimination in Languages Other Than English: ECRCO has determined that currently, ADEM meets the regulatory requirements regarding its Notice, where appropriate, in languages other than English. The regulation requires that "where appropriate, such notice must be in a language or languages other than English."<sup>11</sup> Although, as previously discussed, as of June 2017 ADEM had met the regulatory requirements regarding its Notice being placed in a prominent place, as of June 2017, ADEM had not complied with the regulatory requirement that, where appropriate, this Notice should be provided in languages other than English. As of June 2017, the Notice was only provided in English in a "prominent" place on its website. It is appropriate to provide this important Notice in a language(s) that a significant number and proportion of LEP individuals in Alabama speak.<sup>12</sup> As such, in June

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<sup>8</sup> 40 C.F.R. § 7.95.

<sup>9</sup> *Id.*

<sup>10</sup> Letter from Lance R. LeFleur, Director, ADEM to Lilian S. Dorka, Acting Director, Office of Civil Rights, EPA regarding EPA File No. 06R-03-R4; 12R-13-R4; 13R-16-R4, ADEM Response to EPA Follow-up Information Request. (September 1, 2016). The Guide for Citizen Participation can be found at <http://www.adem.alabama.gov/moreInfo/pubs/citizensguide.pdf>

<sup>11</sup> 40 C.F.R. § 7.95.

<sup>12</sup> See also EPA's Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons. (EPA LEP Recipient Guidance) discusses the importance of ensuring that vital information is provided to LEP individuals, page 35610. at <https://www.federalregister.gov/documents/2004/06/25/04-14464/guidance-to-environmental-protection-agency-financial-assistance-recipients-regarding-title-vi>. In addition, the EPA LEP Recipient Guidance describes the four-factor analysis which is an individualized assessment that recipients can utilize to determine reasonable steps to take in order to provide meaningful access to LEP individuals. *Id.* at pages 35606-35607. See

Director LeFleur

2017, ECRCO advised ADEM that, consistent with EPA's LEP Recipient Guidance, the "four-factor analysis, and the "safe harbor rule" (see below), their Notice should be provided in at least Spanish, which is spoken by the largest number of LEP individuals in Alabama at approximately 72,000,<sup>13</sup> and perhaps other languages as appropriate, in a prominent place.<sup>14</sup>

EPA's LEP Recipient Guidance provides a flexible and fact-dependent analysis which uses four factors to assist in determining the reasonable steps recipients must take in providing meaningful access to their programs and activities. The factors are as follows: (1) the number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and (4) the resources available to the grantee/recipient and costs.<sup>15</sup> The LEP Recipient Guidance also discusses "safe harbor" provisions, that is, actions that will be considered strong evidence of compliance with written translation obligations. A "safe harbor" exists when "[t]he EPA recipient provides written translations of vital documents for each eligible LEP language group that constitutes five percent or includes 1,000 members, whichever is less, of the population of persons eligible to be served or likely to be affected or encountered."<sup>16</sup>

ADEM has since addressed this issue with respect to Spanish translation. Specifically, ADEM's current website includes a link labeled "Nondiscrimination Statement" in the first paragraph on the main home page, which also includes this same link in Spanish. Once selected, the link corresponds to a Webpage that includes the Notice in English and in Spanish. In addition, ADEM's recently updated website includes a section on its home page with translation symbols that when selected lead to a Language Assistance Services Webpage which provides general information in Spanish, Vietnamese, and Korean regarding how to obtain language services.<sup>17</sup> (See Section d below.)

ADEM's Notice is made available through a link in a prominent place on the main ADEM website page. However, the language surrounding the nondiscrimination statement link would benefit from changes to provide greater clarity and transparency for the public's understanding. Although this action is not legally required, ECRCO recommends that the language provide sufficient context for the link to conclude that it leads to information regarding ADEM's obligations under Title VI and other federal nondiscrimination laws.<sup>18</sup>

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also the U.S. Census Bureau, 2011-2015 American Community Survey: Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over. (Alabama)  
[https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_15\\_5YR\\_B16001&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_5YR_B16001&prodType=table)

<sup>13</sup> *Id.* at U.S Census Bureau.

<sup>14</sup> See EPA LEP Recipient Guidance, at 35610. See also fn. 25.

<sup>15</sup> *Id.* at 35606-35607.

<sup>16</sup> *Id.* at 35610.

<sup>17</sup> <http://adem.alabama.gov/inside/translationservice.cnt>

<sup>18</sup> The opening paragraph states: "Welcome to ADEM – Alabama is blessed with a wealth and variety of natural resources which provide significant social, economic, and environmental benefits and opportunities for the citizens of Alabama. The mission at ADEM is to assure for all citizens of the State a safe, healthful, and productive environment. Nondiscrimination Statement/Declaración de no discriminación. This web site is designed to keep you informed and to help you as you live and work in Alabama." <http://www.adem.state.al.us/default.cnt>.

Director LeFleur

- b. Grievance Procedures: EPA's nondiscrimination regulation requires that each recipient adopt grievance procedures that assure the prompt and fair resolution of complaints which allege violations of the regulation.<sup>19</sup> ECRCO has determined that ADEM is meeting the regulatory requirements with the "ADEM Civil Rights and Environmental Justice Complaint Reporting and Investigating Process." Accordingly, ECRCO has determined that there is insufficient evidence of noncompliance. ADEM's current process states that it applies to claims of discrimination based on race, color, national origin, disability, age, or sex. ECRCO strongly recommends that ADEM clarify and explain in the grievance procedures themselves that ADEM will investigate and resolve retaliation and intimidation claims in a prompt and impartial manner under the grievance procedures, just as ADEM states it would do so with any other discrimination claim.<sup>20</sup>

At the time this issue was accepted for investigation in February 2016, ADEM did not have its grievance procedures posted on its website. Later in 2016, ADEM posted its grievance procedures on its website.<sup>21</sup> ECRCO determined that ADEM's grievance procedures available in English, on their face, are adequate to assure the prompt and fair resolution of complaints, as required by the regulation.

However, ECRCO also determined that, as of June 2017, the grievance procedures that ADEM had available through links in languages other than English were not accessible to LEP persons in Alabama, as appropriate, because of material inaccuracies contained in, at least, the Spanish translation.<sup>22</sup> ADEM explained that the translations were made available by ADEM through links located at the bottom of its home page for a web-based translation service, in order to access its grievance procedures in Spanish, Vietnamese and Korean. ECRCO's June 2017 review of the web-based Spanish translation of the grievance procedures, found material inaccuracies in the translation in Spanish. For example, critical terms regarding the prohibited discriminatory basis, such as "race," were not translated correctly and included the wrong usage and definition of the word "race" in Spanish. ECRCO informed ADEM of these deficiencies and of the expectation that information provided in languages other than English be as accurate as the information provided in English.<sup>23</sup> During conversations with ECRCO in July 2017, ADEM explained that it currently utilizes other translation services, including qualified translators provided through a language contract. Through the use of qualified translators, ADEM has updated its Spanish translation of its grievance procedures which are currently available on its website and ECRCO has determined that the Spanish translation is now accurate. In addition, during

<sup>19</sup> 40 C.F.R. § 7.90 (each recipient with 15 or more employees shall adopt grievance procedures that assure the prompt and fair resolution of complaints).

<sup>20</sup> See 40 C.F.R. § 7.100 (stating that "[n]o applicant, recipient, **nor other person** shall intimidate, threaten, coerce, or discriminate against any individual or group. . .") (emphasis added).

<sup>21</sup> <http://adem.alabama.gov/inside/ndstatement.cnt>

<sup>22</sup> See, e.g., Dear Colleague Letter; English Learner Students and Limited English Proficient Parents – U.S. Department of Education and U.S. Department of Justice, at p.38, fn103 (Jan. 27, 2015) (stating that "[u]tilization of such services is appropriate only if the translated document accurately conveys the meaning of the source document, including accurately translating technical vocabulary. The Departments caution against the use of web-based automated translations; translations that are inaccurate are inconsistent with the school district's obligation to communicate effectively with LEP parents"), found at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf>

<sup>23</sup> See LEP Guidance, 69 FR at 35611, at <https://www.federalregister.gov/documents/2004/06/25/04-14464/guidance-to-environmental-protection-agency-financial-assistance-recipients-regarding-title-vi> (discussing the importance of using qualified certified translators.)

Director LeFleur

those July 2017 conversations, ADEM stated that it will ensure that its grievance procedures will be accurately translated and made available in Vietnamese and Korean. As such, ADEM has met the regulatory requirements of the regulation with respect to grievance procedures and accordingly, there is insufficient evidence of current noncompliance.

ADEM must continue to take steps to ensure accurate translations of materials posted on its website going forward and not rely on inaccurate web-based translations. At ADEM's request, ECRCO can provide ADEM with appropriate technical assistance regarding the translation services it has procured for translation of grievance procedures, as well as the translation of any other vital information into additional languages to fulfill its LEP obligations.

- c. Nondiscrimination Coordinator: ECRCO has determined that ADEM is currently meeting the regulatory requirements regarding ADEM's nondiscrimination coordinator. The regulation requires that EPA recipients have a nondiscrimination coordinator to oversee their nondiscrimination program.<sup>24</sup> In addition, under the "Notice of Nondiscrimination" the regulation requires that the Notice "identify the responsible employee" designated as the recipient's Nondiscrimination Coordinator.<sup>25</sup> At the time that ECRCO identified this issue for investigation, and as recently as June 2017, ADEM was not in compliance because it did not specifically identify the actual responsible employee and thus, had not identified at least one person as its Nondiscrimination Coordinator to coordinate its compliance efforts, rather, ADEM had identified only the general position that would carry out these responsibilities. However, ECRCO found that as of June 2017, ECRCO confirmed that ADEM updated its website and included Marilyn Elliot's name and contact information as the Nondiscrimination Coordinator below the Notice of Nondiscrimination, together with her mailing address, email and phone number.

ECRCO notes that ADEM's title for this position is used inconsistently in its nondiscrimination program materials. For example, the current grievance procedures do not use the term "Nondiscrimination Coordinator" but rather initially use the term "Title VI/EJ Coordinator" and then references "EJ Coordinator" throughout the remainder of the document. The inconsistent use of titles for the Nondiscrimination Coordinator position may lead to confusion with the public. Accordingly, although not legally required, ECRCO recommends that ADEM amend its nondiscrimination program materials to ensure it consistently uses the title "Nondiscrimination Coordinator" throughout.

- d. Limited English Proficiency (LEP): Based on ECRCO's review of ADEM's LEP program, ECRCO has determined that, currently, ADEM is meeting the regulatory requirements of Title VI with respect to its responsibility to ensure meaningful access for LEP persons to its programs, services and activities. As this investigation progressed, ECRCO became aware that ADEM was not providing notice to LEP individuals regarding nondiscrimination, nor providing meaningful access to accurate information about its grievance procedures. These concerns were addressed by ADEM during the course of this investigation in response to ECRCO's feedback (See Sections a and b above.)

<sup>24</sup> 40 C.F.R. § 7.85(g) (if a recipient employs 15 or more employees, it shall designate at least one person to coordinate its efforts to comply with its obligations under this part).

<sup>25</sup> See 40 C.F.R. § 7.95.

Director LeFleur

ECRCO also reviewed ADEM's LEP program to determine whether, in general, ADEM has policies and procedures in place to ensure meaningful access for LEP individuals eligible to be served by ADEM's services, programs or activities.

In September 2016, ADEM provided ECRCO a copy of ADEM's "Title VI Manual" which included a section titled "Limited English Proficient (LEP) Program." That section of ADEM's internal Title VI Manual, which ADEM identified as its LEP plan, in part, briefly described Alabama's LEP statistics and stated that "[a]ccording to the U.S. Department of Justice (DOJ) website, Alabama is one of the states where LEP should not present a significant problem."<sup>26</sup> In June 2017, ECRCO discussed this statement with ADEM and pointed out that DOJ does not make this statement on its website. ADEM clarified that it did not mean to suggest that DOJ said this on its website, rather that the statement reflects ADEM's interpretation of the statistics found in the tables at DOJ's website. However, as ECRCO shared with ADEM, on its face, this statement is misleading as it may be interpreted as suggesting that no language services are necessary for LEP persons in Alabama. Further, ECRCO shared with ADEM that the portion of its Manual that it was identifying as its LEP Plan was not sufficiently developed so as to address the critical areas for ensuring meaningful access for LEP individuals, as required by statutory and regulatory authority.<sup>27</sup> EPA's LEP Recipient Guidance gives further direction on providing services to LEP individuals, including the four-factor analysis, to assist ADEM in determining the reasonable steps it will take to provide meaningful access to its programs and activities.<sup>28</sup> Thus, to the extent that the portion of the ADEM Manual identified as its LEP Plan represented ADEM's only response to its obligation to provide meaningful access for LEP persons, this would have raised a Title VI concern. However, ADEM has shared additional information, including information about the contract it currently utilizes to provide for qualified translation and interpretation services, which provides further clarification as to the reasonable steps it is taking to ensure meaningful access to its programs and activities for LEP individuals. ECRCO asserts its continued willingness to provide technical assistance to ADEM to further improve its LEP program.

Although not legally required, ECRCO recommends that ADEM update its current written LEP Plan to ensure it addresses all LEP language groups, in light of their number and proportion.<sup>29</sup> In addition, although not legally required, ECRCO recommends that ADEM

<sup>26</sup> Letter from Lance R. LeFleur, Director, ADEM to Lilian S. Dorka, Acting Director, Office of Civil Rights, EPA regarding EPA File No. 06R-03-R4; 12R-13-R4; 13R-16-R4, ADEM Response to EPA Follow-up Information Request. (September 1, 2016). This response included ADEM's internal Title VI Manual which provided a brief overview of ADEM's LEP Program.

<sup>27</sup> See Title VI of the Civil Rights Act, 42 U.S.C. 2000(d) (prohibiting discrimination on the basis of national origin); *Lau*, 414 U.S. 563, 568-69 (finding that the government properly required language services to be provided under a recipient's Title VI obligations not to discriminate based on national origin.); 40 C.F.R. § 7.35(a) (prohibiting discrimination on the basis of national origin in the programs or activities of a recipient of EPA assistance).

<sup>28</sup> LEP Recipient Guidance, 69 FR 35602 (June 25, 2004), at <https://www.federalregister.gov/documents/2004/06/25/04-14464/guidance-to-environmental-protection-agency-financial-assistance-recipients-regarding-title-vi>, pages 35606-35607.

<sup>29</sup> U.S. Census Bureau, 2011-2015 American Community Survey: Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over. (Alabama) [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_15\\_5YR\\_B16001&prodTy pe=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_5YR_B16001&prodTy pe=table) Based on the U.S. Census Bureau's *American FactFinder*, Alabama's population has the following LEP language groups that meet this threshold, including Spanish, Chinese, Korean, Vietnamese, Tagalog, Arabic, German and French. Alabama's LEP groups who speak English less than "very well" with Spanish at 72,372, Chinese at 5,289, Korean at 4,985, Vietnamese at 3,892, Tagalog at 1,033, Arabic at 1,566, German at 1,383, and



Director LeFleur

make its Title VI Manual and LEP Plan publicly-available on its website. When available on its website, these materials should also be available in the appropriate languages other than English.<sup>30</sup>

- e. Individuals with Disabilities: ECRCO has reviewed the components of ADEM's disability program and has determined ADEM is meeting the regulatory requirements of providing notice and providing meaningful access to individuals with disabilities to ADEM's programs, services and activities.

At the time this issue was identified for investigation, ADEM did not provide information on its website regarding obtaining assistance for disability needs. Although not on its website at the time, ADEM has been utilizing an internal document identified as General Guidelines for Public Participation/Hearings/Meetings. This document specifies that prior to events, ADEM will determine and ensure the facility is accessible by the public.<sup>31</sup> ECRCO notes that ADEM has recently enhanced information related to accessibility for its disability-related services. For example, ADEM has included disability symbols on the left hand side of its home page that leads to a follow up page which offers an email address if disability assistance is needed and specifically outlines the types of services that it provides.<sup>32</sup>

Additionally, ECRCO notes that in ADEM public permit notices a contact number for the Department's Permits and Services Division is provided if accommodations are needed. The notice reads as follows "Any person wishing to participate in this hearing who needs accommodations should contact the Department's Permits & Services Division at (334) 271-7714 at least five working days prior to the hearing."

Although not legally required, ECRCO recommends that ADEM make its public participation materials more transparent by providing the information that is currently contained in its internal General Guidelines for Public Participation/ Hearings/ Meetings document, or the document itself, to the public to better communicate to the public the rights of persons with disabilities and the different aids and services that may be needed for individuals with disabilities.

- f. Public Participation: ECRCO has reviewed the components of ADEM's public participation program and has determined there is insufficient evidence of noncompliance with Title VI. ECRCO's review found that ADEM has developed publications which address public involvement, including the "Guide for Citizen Participation" (revised March 2014), the "Public Participation in ADEM Rulemaking and Permitting Process" (revised August 2015), and the "Community Engagement" document (updated August 2016).

ECRCO found that ADEM has engaged with the public to discuss issues of concern and conducted a citizen's education program which included community workshops in Mobile, Birmingham, Montgomery and Uniontown to train individuals on how to access

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French at 1,314.

<sup>30</sup> See LEP Recipient Guidance, 69 FR at 35606, at <https://www.federalregister.gov/documents/2004/06/25/04-14464/guidance-to-environmental-protection-agency-financial-assistance-recipients-regarding-title-vi>.

<sup>31</sup> For clarification, although ADEM refers to disability access issues under the Americans with Disabilities Act, nondiscrimination under Federal grants and programs must adhere to the Section 504 of the Rehabilitation Act of 1973.

<sup>32</sup> <http://adem.alabama.gov/inside/disability.cnt>.



Director LeFleur

environmental information from ADEM's website.<sup>33</sup> In addition, ADEM has created an internal Public Participation Checklist, which explains the process taken before any public event including, the review of demographics, determining whether the facility is accessible to individuals with disabilities, and ensuring that any other accommodation needed is made available to the public, e.g. language services.<sup>34</sup> Although not legally required in this general context, ECRCO recommends that ADEM's public participation guidelines include a description of the appropriate community for public involvement, which should at a minimum, include demographics, history, and background.

In November 2017, it was brought to ECRCO's attention that there was an instance in which ADEM may not have appropriately responded to a comment submitted by the public. Specifically, in ADEM's November 1, 2017 Response to Comments for the City of Dothan Landfill Permit Modification Permit No. 35-06 a comment was raised that a local public official used the "N-word" to describe African-Americans in this community. Based on the hearing record, it appears ADEM did not address the derogatory racial comment, ADEM responded by referencing the proposed permit's compliance with ADEM's solid waste regulations and, in addition, ADEM stated that the allegations regarding the landfill being located in a predominately minority area are related to the siting of the landfill and are not appropriate for ADEM to consider.<sup>35</sup> ECRCO notes that the records do not reflect that ADEM considered these allegations within the context of their nondiscrimination program. ECRCO reminds ADEM that EPA's nondiscrimination regulation requires that recipients have in place grievance procedures to address discrimination matters. In addition, as emphasized in the EPA's Public Involvement Guidance for Recipients, recipients, such as ADEM, should build relationships with the public and understand and promptly respond to the concerns that are brought to their attention.<sup>36</sup>

Moreover, although not legally required, ECRCO recommends that ADEM increase its leadership role in bringing together the Dothan community, permittees, as well as other local government entities to share important information, ensure that its citizens and stakeholders understand roles, rights and responsibilities and address issues constructively. Although not legally required, ECRCO recommends that ADEM identify stakeholders in the community by making a concerted effort to create and/or re-engage partnerships with private and public entities to share information on its website and through standard media outlets. Such information sharing would ideally include the relevant community in the geographic area near the Dothan Landfill and those individuals and groups that have previously expressed an interest in environmental decision-making activities; environment and environmental justice organizations; religious institutions and organizations; public administration, environmental,

<sup>33</sup> This training occurred in Uniontown in February 2014 and specifically provided an overview of how to access data, participate in the permit process, review the compliance records of permitted or regulated entities, and how to file environmental complaints and concerns.

<sup>34</sup> General Guidelines for Public Participation/Hearings/Meetings, Appendix E-1 of Title VI Manual.

<sup>35</sup> ADEM's Response to Comments City of Dothan Landfill Permit Modification Permit No. 35-06. (November 1, 2017). [http://app.adem.alabama.gov/eFile/File name 04007\\_35-06\\_069\\_20171101\\_PERM\\_Response\\_to\\_Comments.pdf](http://app.adem.alabama.gov/eFile/File%20name%2004007_35-06_069_20171101_PERM_Response_to_Comments.pdf)

<sup>36</sup> See Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs, 71 FR at 14211 (discussing recipient staff training and the importance of actively listening to the public's concerns, considering the public's opinions, and addressing the public's questions in a prompt and respectful manner). <https://www.gpo.gov/fdsys/pkg/FR-2006-03-21/pdf/06-2691.pdf>

Director LeFleur

law and health departments at colleges and universities; tribal governments; and relevant community service organizations.

## Conclusion

As previously discussed, ECRCO has determined that at the time of the complaint filing, ADEM was not in compliance with the regulatory requirements of the EPA nondiscrimination regulation; but during the pendency of this investigation, and as a result of technical assistance provided by ECRCO, ADEM has made improvements and is now currently meeting the regulatory requirements of the EPA nondiscrimination regulation. As such, ECRCO finds insufficient evidence of current noncompliance with Title VI, Section 504 and EPA's implementing regulation at 40 C.F.R. Part 7. In making this finding, EPA makes no determination regarding ADEM's effective implementation of its nondiscrimination program. ECRCO did not review ADEM's application of its nondiscrimination policies and procedures, such as, for example ADEM's acceptance, investigation and resolution of an actual complaint pursuant to its nondiscrimination grievance procedures.

Thank you and your staff for your cooperation during this investigation. If you have any questions, please feel free to contact me at (202) 564-9649, by e-mail at [dorka.lilian@epa.gov](mailto:dorka.lilian@epa.gov), or U.S. mail at U.S. EPA, Office of General Counsel, External Civil Rights Compliance Office (Mail Code 2310A), 1200 Pennsylvania Avenue, N.W., Washington, D.C., 20460.

Sincerely,



Lilian S. Dorka, Director  
External Civil Rights Compliance Office  
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